No. 93-1023

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF LOS ANGELES,
Petitioner,
vs.
TOPANGA PRESS, INC.; STUART PARR; BRAND X VIDEO, INC.; E.W.A.P., INC.; LIBRARY ONE, INC.; HARDROCK, INC.; BEVERLY BOOKS, INC.; WHITEY, INC.; NEW WAVE, INC.; N.F.M. CORPORATION; PLUSH BOUTIQUE; CAROLINA ENTERPRISES; DASH, INC.; JOTH, INC.; JOAMAR, INC.; JAN RUBINI; 7180 SUNSET BLVD., INC.; A.L.Q. CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should certiorari be granted to correct the Court of Appeals' decision which is in direct conflict with *Young v. American Mini Theatres*, 427 U.S. 50, 49 L.Ed.2d 310 (1976); *City of Renton v. Playtime Theatres*, 475 U.S. 41, 89 L.Ed.2d 29 (1986); and *Barnes v. Glen Theatre, Inc.*, 501 U.S. __, 115 L.Ed.2d 504 (1991)?

2. Did the District Court abuse its discretion by issuing a preliminary injunction against enforcement of Los Angeles' adult entertainment zoning ordinance as violative of the First and Fourteenth Amendments to the Constitution of the United States?

3. Is the respondents' lawsuit, filed without any claim or evidence that any respondent cannot find an alternative site for its business, ripe for adjudication in the federal courts under the standards established in *Reno v. Catholic Social Services*, __ U.S. __, 125 L.Ed.2d 38, 113 S.Ct. 2485 (1993)?

4. Are respondents' claims barred by the statute of limitations as determined by reference to *Wilson v. Garcia*, 471 U.S. 261, 85 L.Ed.2d 254 (1985)?

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

CITY OF LOS ANGELES,
Petitioner,
vs.
TOPANGA PRESS, INC.; STUART PARR; BRAND X VIDEO, INC.; E.W.A.P., INC.; LIBRARY ONE, INC.; HARDROCK, INC.; BEVERLY BOOKS, INC.; WHITEY, INC.; NEW WAVE, INC.; N.F.M. CORPORATION; PLUSH BOUTIQUE; CAROLINA ENTERPRISES; DASH, INC.; JOTH, INC.; JOAMAR, INC.; JAN RUBINI; 7180 SUNSET BLVD., INC.; A.L.Q. CORPORATION,[1]
Respondents.

PETITION FOR WRIT OF CERTIORARI

The City of Los Angeles ("City") hereby petitions this Court for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit.

The City has enacted an adult entertainment zoning ordinance consistent with the clear authority of *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 49 L.Ed.2d 310 (1976) ("*Young*"), and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 89 L.Ed.2d 29 (1986) ("*Renton*").

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[1] All parties to this proceeding are listed in the caption of this petition.

The District Court abused its discretion and preliminarily enjoined the enforcement of the City's ordinance, citing serious questions as to the presence of available sites. In order to affirm the District Court, the Court of Appeals then compounded the District Court's error grievously by rendering a decision that tore this Court's *Young* and *Renton* holdings asunder. The Court of Appeals, contrary to the strictures of this Court which emphasized that the inquiry in such cases is not concerned with economic impact, reimposed requirements of commercial viability and economic access upon the City's potential sites and only after doing so upheld the District Court's injunction. By defying this Court's decisions, the Court of Appeals has relegated the City to the status of real estate broker for a specialized clientele — adult business owners.

The decision of the Ninth Circuit also is in conflict with the decisions of other circuits, which have assiduously followed the *Renton* and *Young* analysis. Furthermore, the Court of Appeals opinion is in conflict with a case of the California Supreme Court which evaluated an adult business zoning case in light of *Young* and *Renton*.

Moreover, the Court of Appeals decision conflicts with *Barnes v. Glen Theatre, Inc.*, 501 U.S. __, 115 L.Ed.2d 504 (1991), which upheld an Indiana statute banning public nudity as applied to commercial nude dancing, by preventing enforcement of the City's ordinance against adult cabarets.

The application of *Renton* and *Young* further requires a determination that the District Court abused its discretion issuing the injunction. In addition, this case is neither ripe for adjudication nor have respondents filed the action within the applicable statute of limitations.

OPINIONS AND ORDERS BELOW

1. The Court of Appeals, March 22, 1993, opinion below is reproduced in Appendix ("App.") A. That court's order and opinion upon the granting of rehearing is reported at 984 F.2d 1254 and reproduced in App. B.

2. The June 22, 1991 Order of the District Court granting the preliminary injunction, which was unreported, is reproduced in App. E.

JURISDICTION

The District Court asserted jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343. The Court of Appeals jurisdiction was based on 28 U.S.C. § 1292(a)(1). This Court has jurisdiction pursuant to 28 U.S.C. § 2103.

The Court of Appeals denied petitioner's petition for rehearing on August 31, 1992 (App. C 1-2) and respondents' petition for rehearing in September 20, 1993. App. C 3. By order of Justice Sandra Day O'Connor, pursuant to Rule 13.4 of this Court, the date for filing this Petition was extended to Sunday, December 19, 1993.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case principally involves the First and Fourteenth Amendments to the United States Constitution and two of the City's ordinances affecting the zoning of adult entertainment businesses, Los Angeles Municipal Code sections 12.70 and 12.22A20. The First Amendment states in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

The Fourteenth Amendment declares in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

The Municipal Code sections are set forth in their entirety in App. F.

STATEMENT OF THE CASE

A. The History and Background for the City's Ordinance

On January 12, 1977, the Los Angeles City Council ("Council") instructed the City's Planning Department and other city agencies to conduct a comprehensive study to determine whether concentration of adult entertainment establishments had a blighting or degrading

effect on nearby neighborhoods. App. F 1. The Study determined the deleterious effect of adult businesses on the community. The Study concluded that "concentrations of adult entertainment businesses have, in some cases, had direct negative impact on property values." In public meetings summarized in the Study, members of the community testified to the negative effects of adult entertainment businesses.

Section 12.70 was enacted in 1978, at which time it prohibited adult businesses from being established, substantially enlarged or subject to transfer of ownership within 500 feet from churches, schools or parks, or within 1,000 feet of another adult business. In the preamble of the 1978 ordinance (App. F 1-2), the Council, relying on the 1977 Study by the Planning Department, found that "the concentration of such adult businesses tends to result in the blighting and degrading of the areas of such concentration. . . ." The ordinance stated that the separation requirements were enacted to prevent the further concentration of the businesses and "the continued erosion of the character of affected neighborhoods of the City; . . ." App. F 2.

Effective May 13, 1983, the Council enacted Ordinance No. 157,538, which amended Section 12.70C to prohibit the maintenance of more than one adult business in the same building or structure. App. F 8.

Effective January 13, 1984, the Council passed Ordinance No. 158,579, a moratorium ordinance which first addressed the separation requirements between adult businesses and residential or "R" zones in the City. The ordinance forbade the establishment of new adult

businesses "within 500 feet of any lot in an 'A' or 'R' zone, or within the 'CR', 'C1', or 'C1.5' zones in the City of Los Angeles." Ordinance No. 158,579 was accompanied by a further Planning Department Study that detailed additional blighting effects of adult businesses in Los Angeles and also set forth the similar results of a related Phoenix, Arizona, study.

Finally, in 1986 the Council enacted Ordinance No. 161,111 ("1986 Ordinance"). The 1986 Ordinance prohibited the continued operation, after March 6, 1988, of adult businesses which did not meet the distance requirements of the 1984 moratorium ordinance. App. F 8.

The 1986 Ordinance also amended Section 12.22A20 (a) (App. F 11-12) to provide a procedure allowing the continued operation of adult businesses whenever "a site consistent with Section 12.70C is not reasonably available elsewhere in the City for the establishment or relocation of the subject adult entertainment business." Section 12.22A20 is not challenged in this action.

The 1986 Ordinance also provided in Section 12.22A20(b) that an adult entertainment business existing on March 6, 1986, could continue in operation until March 6, 1991, by virtue of an extension granted by the City's Office of Zoning Administration if it could establish either undue financial hardship based on investment or the existence of a written lease extending past March 6, 1988. App. F 12-14.

In a 1985 Study supporting adoption of the 1986 Ordinance, the City's Planning Department determined that numerous adult businesses, including 39 "Bookstores/Arcades," still were operating within the City.

The 1985 Study described public hearings and responses to questionnaires which produced additional evidence of the degrading effects of adult businesses on nearby areas. The 1985 Study also described a 1984 Los Angeles Police Department report that showed a statistical correlation between the rise of crime and an increase in number of adult businesses.

B. Proceedings Below

In February 1991 respondents filed a First Amended Complaint and separate individual complaints pursuant to 42 U.S.C. § 1983 challenging the constitutionality of Section 12.70. Respondents specifically challenged those portions of Section 12.70C that prohibit current adult businesses from being maintained within 500 feet of an "R" zone and that forbid the operation of more than one adult business in one building. In addition, respondents claimed that the combination of location restrictions in Section 12.70 unconstitutionally limits the alternative avenues of expression for protected free speech in the City. Respondents also challenged as vague the City's definitions of "adult arcade," "adult bookstore," and "adult cabaret." [2]

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[2] Respondents DASH, INC., JOMAR, INC., JOTH, INC., CAROLINA ENTERPRISES, INC., 7180 SUNSET BLVD., INC., and A.L.Q. CORPORATION alleged they are "adult cabarets within the meaning of Section 12.70 B." The amended complaints filed by the plaintiffs in August 1991 confirm that only TOPANGA PRESS does not claim to be an adult business according to the definition of Section 12.70. All respondents except BRAND X alleged that their businesses are within 500 feet of an "R" zone in the City.

(continued)

Respondents alleged that the combined impact of the City's ordinances would force the closure of the "overwhelming majority of existing adult businesses." If they must vacate their present premises, according to the complaints, respondents would not be able to relocate "due to a lack of an adequate number of commercially viable and/or legally available relocation sites." The respondents who operate combination bookstores and arcades asserted separately that the City Council had no basis for prohibiting their joint operation in 1983, and that their relocation as two separate businesses will be "commercially impossible."

The respondents alleged they have not sought an exception pursuant to Section 12.22A20(a) because it is too expensive, "coupled with its futility." The respondents defined futility by stating that their application would be denied "if there is a single available site."

Respondents simultaneously filed three separate motions for a preliminary injunction. The first requested relief from the residential proximity restriction enacted in 1986. The second contended that the City's requirement, enacted in 1983, that adult businesses be placed in separate buildings was enacted without substantial justification. The third sought an injunction based on the claim that the ordinance was unconstitutionally vague.

(fn. continued)
Respondents PLUSH BOUTIQUE and CAROLINA ENTERPRISES, INC. alleged that they operate within the same building. Respondents N.F.M., INC., PLUSH BOUTIQUE; BEVERLY BOOKS, INC.; PARR; BRAND X; WHITEY, INC.; HARDROCK, INC.; NEW WAVE, INC.; and E.W.A.P., INC. operate stores that both sell sexually oriented media items and contain viewing booths.

The City opposed respondents' motions for an injunction. The City also filed a Motion to Dismiss the complaints, contending in part that respondents had failed to obtain a final City determination as to the use of their property. In addition, the City filed a Motion to Abstain.

On June 17, 1991, the District Court granted the respondents' motions. App. E. The court at the hearing on the motions stated:

> "[The respondents] have raised serious questions. There's no doubt about that. And the hardships are negligible to the City, if any at all, in the sense that there has been a forbearance of enforcement of this regulation for a long time, and I'm going to get to the issue real quickly." App. D 3.

The District Court denied the City's motions to dismiss and to abstain.

On March 22, 1993, the Court of Appeals affirmed the District Court's order. App. A. On April 23, 1993, the Court of Appeals issued an amended opinion. App. B. That opinion made technical changes in the March opinion. Petitioner directs this Court to the amended opinion for purposes of this Petition.

REASONS FOR GRANTING THE WRIT

A. The Court Should Grant The Petition To Review The Ninth Circuit's Refusal To Follow The Law Set Forth In *Young* and *Renton*

The Court of Appeals opinion effectively nullifies the law stated in *Young* and *Renton*. The Court of Appeals in order to reach its decision re-introduced a "commercial viability" criterion for determining the availability of alternative sites. The lower court has effectively ruled that the City has a constitutional obligation to assure the existence of sites for adult business.

Young and *Renton* established that local governments are entitled to regulate the location of businesses which purvey adult material. *Young*, 427 at 62-63, 49 L.Ed.2d at 321-322; *Renton*, 475 U.S. at 52, 89 L.Ed.2d at 41. The Supreme Court in *Renton* stated the test for adult entertainment zoning ordinances as follows:

> "The Renton ordinance, like the one in *American Mini Theatres,* does not ban adult theaters altogether, but merely provides that such theaters may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The ordinance is therefore properly analyzed as a form of time, place, and manner regulation. *Id.*, at 63, and n. 18, 96 S.Ct. at 2448 and n. 18; *id.*, at 78-79, 96 S.Ct., at 2456 (POWELL J., concurring).
>
> * * *

> "[S]o-called 'content-neutral' time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. [Citations.]" 475 U.S. at 46-47, 89 L.Ed.2d at 37.

A zoning classification based on the adult character of a business does not violate the First Amendment. The *Young* court explained:

> "We have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the City. The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances." *Id.*, 427 U.S. at 62, 49 L.Ed.2d at 321.

The City's zoning ordinance *on its face* classifies adult entertainment businesses in a manner similar to the ordinances upheld by the Supreme Court. *Young, supra*, 427 U.S. at 70-73, 49 L.Ed.2d at 326-27; *Renton, supra*, 475 U.S. at 44, 89 L.Ed.2d at 36.

In 1976, in his concurring opinion in *Young*, Justice Powell stated:

> "The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation. The cases are legion that sustain zoning against claims of serious economic damage. The inquiry for First Amendment purposes is not concerned with economic impact; rather it looks only to the effect of this ordinance upon freedom of expression." *Young*, 427 U.S. at 78, 49 L.Ed.2d at 330 (Powell, J., concurring.)

In 1981, Renton, Washington, enacted an ordinance that precluded an adult motion picture theater from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church or park, or within one mile of any school. This Court adopted the District Court's finding that 520 acres of the City's land was open to use as adult theater sites.

> "[T]he 520 acres of land consists of 'ample, accessible real estate,' including 'acreage in all stages of development from raw land to developed, industrial, warehouse, office and shopping space that is criss-crossed by freeways, highways, and roads.' " *Renton*, 475 U.S. at 53, 89 L.Ed.2d at 29.

The Renton theater owners had argued in the Court of Appeals that because some of the available acreage was already occupied, most of the undeveloped land was not currently for sale or lease, and there were no "commercially viable" sites, the ordinance substantially restricted speech. *Id.*, 475 U.S. at 53-54, 89 L.Ed.2d at 41-42. However, in a holding that governs the resolution of this case, the Court stated:

> "That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have 'the effect of suppressing, or greatly restricting access to, lawful speech,' *American Mini Theatres*, 427 U.S., at 71, n. 35, 96 S.Ct., at 2453, n. 35 (plurality opinion), we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. See *id.*, at 78, 96 S.Ct., at 2456 (POWELL, J., concurring) ('The inquiry for First Amendment purposes is not concerned with economic impact'). In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the

> city, and the ordinance before us easily meets this requirement." *Id.*, 475 U.S. at 54, 89 L.Ed.2d at 42.[3]

In defiance of *Young* and *Renton*, the Court of Appeals in this case, after an obligatory acknowledgement that *Renton prohibited* consideration of economic impact (App. B 8 - B 9), went on to *consider* economic impact:

> "For purposes of *Renton*, the distinction is between consideration of *economic impact within* an actual business real estate market and consideration of *cost* to determine whether a specific relocation site *is part* of the relevant market. A court may not consider the former, but it *may* consider the latter when determining whether a specific site is *reasonably*

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[3] The Court of Appeals opinion in *Renton* set forth the circumstances it believed demonstrated the *unavailability* of certain sites:

> "A substantial part of the 520 acres is occupied by:
> (1) a sewage disposal site and treatment plant;
> (2) a horseracing track and environs;
> (3) a business park containing buildings suitable only for industrial use;
> (4) a warehouse and manufacturing facilities;
> (5) a Mobil Oil tank farm; and
> (6) a fully-developed shopping center."
> *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527, 534 (9th Cir. 1984).

This Court explicitly *rejected* the notion that these sites were unavailable for purposes of determining the restrictive impact of an adult business zoning ordinance.

> *suitable* for the operation of a business." App. B 10, emphasis added and in the court's opinion.

Without blinking, the Court of Appeals simply discarded this Court's admonition that "we have never suggested that the First Amendment compels the Government to ensure that adult theaters . . . will be able to obtain sites at bargain prices." *Renton*, 475 U.S. at 54, 89 L.Ed.2d at 42. The Ninth Circuit has rejected *Renton*'s "money-blind" test. *Renton* requires adult businesses to "fend for themselves." *Ibid.* That is how the market operates, and that is why this Court held that accessible real estate could include a variety of properties.

The reason for the Court of Appeals' approach is apparent: the evidence produced by respondents would not support the injunction unless economic factors were considered to determine availability of alternative sites.

There is no evidence in the record that any respondent cannot find an alternative relocation site in the City for its adult business. The declarations in support of the motion for preliminary injunction assert only that there may be market barriers to relocation and that it will be difficult for the businesses to survive.

The Field Survey and deposition of respondents' witness Michael F. Taugher and the declaration of respondents' witness Bruce J. Bailey establish that sufficient alternative avenues of communication for adult entertainment exist in the City of Los Angeles. Mr. Taugher found 19,053.8 acres in the City to be "definitionally permissible" areas, *i.e.*, land outside the distance restrictions of Section 12.70. After eliminating acreage "where it would be physically or practically impossible to locate," Mr. Taugher admitted that the

City supplied a land area of 7,440.9 acres where an adult business could locate.

Moreover, Mr. Taugher stated that he eliminated many of the properties from consideration in part based on fiscal impracticality, because he felt that the premises could not be purchased or used as a commercial enterprise, because one integral business occupied the property, or because the business at the site was large. Thus, many of the areas Mr. Taugher eliminated as not realistically available are constitutionally available under *Renton*.

The true picture drawn by Mr. Taugher of the City's commercial and manufacturing zones is an incredible profusion of office, retail, service, and manufacturing uses of many sizes, legally available for use as adult business locations. Mr. Taugher conceded as much and even located sites for many of the respondents near their current places of business. Moreover, it is clear from the zoning maps in evidence that streets, highways and freeways provide access to all portions of the City where the available locations exist. This is precisely the type of market that *Renton* anticipates adult businesses can enter into on an equal footing.

Bruce J. Bailey's declaration stated that he found "approximately 500,000 separate parcels of land" within the "definitionally permissible" area as identified by Mr. Taugher. However, contrary to *Renton*, he eliminated approximately 99 percent of these properties "as not being viable," in large part because of "prohibitive cost," the facilities being "simply out of the reach of any small commercial user . . ." or "prohibitively expensive," and on the ground that the properties were "located within areas which simply failed to meet the basic requirements of any retailer." Nevertheless, the Court of Appeals sanctioned the use of respondent's

evidence of economic impact to support the preliminary injunction.[4]

In case there is any doubt about the import of its opinion, the Court of Appeals discussed at some length the financial and economic factors that cities must weigh to aid adult businesses in their search for available sites. App. B 10, *et seq.* For example, the appeals court stated that it may legitimately consider "the cost of altering or developing the area to change its physical characteristics." App. B 11.

In addition, the Circuit Court's opinion required that a city must be prepared to find sites for the businesses which are "reasonably accessible to the general public" to be part of the market. App. B 13. Not only is this a substitution of a vague and unworkable test for *Renton*'s approval of "acreage . . . that is criss-crossed by freeways, highways, and roads"; it also implies a factor based upon economic advantage. Justice Powell in his concurrence in *Young*, stated that whether "some prospective patrons may be inconvenienced by this dispersal" cannot be a factor in evaluating an ordinance's constitutionality. *Id.*, 427 U.S. at 79, 49 L.Ed.2d at 331.

Problematically, the Court of Appeals declared that "when a relocation site suits some generic commercial enterprise, although not every particular enterprise, it too may be said to be part of the real estate market." App. B

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[4] The Court of Appeals acknowledged that Mr. Taugher confirmed that at least 7,440 acres of the City were "realistically available" (App. B 15) and that Mr. Bailey determined that 120 "potentially viable" sites existed. *Ibid.* The court conceded that these figures support the ordinance but suggested that "a risk exists" that they are "misleading." App. B 18. The Court of Appeals bypassed the admissions in Mr. Bailey's declaration and only stated perfunctorily that he "improperly" used economic and other factors to eliminate sites. App. B 15.

13. The word "suits" results in an economic analysis, as does the court's suggestion that the determination of availability rests ultimately on whether "any business would choose" the location. *Ibid.*[5]

The application of the lower court's extraordinary opinion will shake the foundation of local laws enacted in reasonable reliance on *Young* and *Renton*. The Court of Appeals opinion is so fundamentally in conflict with *Young* and *Renton* that certiorari should be granted.

B. The Petition Should Be Granted To Review the Court Of Appeals Decision In Light Of *Barnes*

The Court of Appeals in its rush to judgment also ignored the effect of this Court's ruling in *Barnes v. Glen Theatre, Inc.*, 501 U.S. __, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), on the complaints brought by the adult cabarets.

In *Barnes*, the respondents included "two establishments . . . that wish to provide totally nude dancing as entertainment, . . ." 115 L.Ed.2d at 509. The plurality opinion held that Indiana's statute prohibiting public nudity furthered the substantial interest of the state in protecting societal order and morality; that it prohibited not the erotic message of dancing but only public nudity; and that it imposed an incidental restriction on

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[5] The Court of Appeals included within the market only areas with "a proper infra-structure." App. B 13. Yet even "raw land" is considered accessible under *Renton*. 475 U.S. at 53, 89 L.Ed.2d at 41. The appeals court also stated: "[T]hose relocation sites which are commercially zoned are part of the market." App. B 13. There is no requirement in *Young* and *Renton* that a location be commercially zoned to be available.

expression no greater than was essential to the furtherance of the governmental interest. *Id.*, 115 L.Ed.2d at 513-515.

Justice Scalia would have held the law valid as a general law regulating conduct and thus not subject to First Amendment scrutiny at all. *Id.*, 115 L.Ed.2d at 515-521. According to the concurring opinion of Justice Souter, Indiana was permitted to ban commercial nude dancing based upon the judicially noticeable secondary effects that the establishments create. *Id.*, 115 L.Ed.2d at 522-525.

The issue of the propriety of the City's regulation of the adult cabaret respondents in this case cannot be resolved differently than that of the Indiana statute in *Barnes*. Section 12.70 does not ban nude dancing in business establishments. Even though adult businesses cause recognized secondary effects, Section 12.70 makes thousands of acres in industrial and commercial zones available for those businesses. After *Barnes* there can be no doubt that the City's regulation of the adult cabarets survives constitutional scrutiny.

C. This Court Should Grant Review To Resolve The Conflict Between The Decision Below And Those Of Four Other Courts Of Appeals In Applying The Standards Of *Renton* And *Young*

When the Court of Appeals jettisoned this Court's "money-blind" approach to the evaluation of alternative avenues of communication established in *Renton* and *Young*, it persisted with an analysis in conflict with the

current view of four other circuits.[6] These cases make it clear that the City is not required to provide cut-rate real estate prices or economic success to adult businesses it restricts or relocates.

In *D.G. Restaurant Corp. v. Myrtle Beach, supra*, 953 F.2d 140, the Fourth Circuit upheld an ordinance that restricted the location of businesses that permitted nudity. In response to the business owner's claim that the local law relegated adult businesses to poorly lit sites industrial areas, far from tourist-oriented businesses, the court responded,

> "The decision to restrict adult businesses to a specific area does not oblige the City to provide commercially desirable land. See *Renton*, 475 U.S. at 54, 106 S.Ct. at 932." *Id.*, 953 F.2d at 147.

Recent Fifth Circuit opinions have held true to the case of *Hart Book Stores, Inc. v. Edmisten, supra*, 612 F.2d 821. That case upheld a North Carolina statute forbidding two adult establishments in a single building. The Court of Appeals declared:

> "Zoning and other regulations for the public welfare frequently are an

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[6] *D.G. Restaurant Corporation v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991); *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (5th Cir. 1979), *cert. den.*, 447 U.S. 929 (1980); *Lakeland Lounge v. City of Jackson*, 973 F.2d 1255 (5th Cir. 1992), *cert. den.*, 123 L.Ed.2d 469 (1993); *Woodall v. City of El Paso*, 959 F.2d 1305 (5th Cir. 1992), *cert. den.*, 121 L.Ed.2d 227 (1992); *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988), *cert. den.*, 489 U.S. 1052 (1989); *Alexander v. City of Minneapolis*, 928 F.2d 278 (8th Cir. 1991); and *International Food and Beverage Systems v. City of Fort Lauderdale*, 794 F.2d 1520 (11th Cir. 1986).

> economic detriment to affected businesses; the fact that these carry materials protected by the First Amendment does not except them from the consequences of an otherwise valid regulation." *Id.*, 612 F.2d at 827.

In a case significant for the large metropolitan area of Los Angeles, the Fifth Circuit in *SDJ, Inc. v. City of Houston, supra*, 837 F.2d 1268, affirmed the district court's determination that sufficient alternative sites existed for the relocation of 23 topless bars under the distance separation requirements of a Houston ordinance. The plaintiffs claimed that 40 relocation sites were unavailable or unsuitable for commercial uses. Holding that "alternative sites need not be commercially viable," the court rejected this claim. *Id.*, 837 F.2d at 1277.

In *Woodall v. City of El Paso, supra*, 959 F.2d 1305, the Fifth Circuit, upon the grant of a petition for rehearing by the panel, deleted that portion of its earlier opinion (950 F.2d 255) that implied that economic restrictions might make land unavailable to adult businesses. Instead, the court stated:

> "We do not endorse appellants' formulation that land is not available for use by the adult businesses if it would be 'unreasonable' to expect adult businesses to relocate there." *Id.*, 959 F.2d at 1306.[7]

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[7] In its opinion, the Court of Appeals authorized a jury instruction that strictly limited the criteria by which land could be found to be unavailable. Unavailable land is only

> "that land with physical characteristics that render it unavailable for any kind of

(continued)

Finally, the Fifth Circuit, in *Lakeland Lounge v. Jackson, supra*, 973 F.2d 1255, held constitutional a Jackson ordinance dispersing adult entertainment businesses to light industrial zoned areas, with additional separation requirements. The court stated, in response to the district court's statement that some of the proposed locations were in remote areas of the city divorced from other retail or commercial development: "The fact that these locations do not seem particularly desirable for economic reasons does not matter." *Id.*, 973 F.2d at 1260.

The Eighth Circuit in *Alexander v. City of Minneapolis, supra*, 928 F.2d 278, dealt with a Minneapolis ordinance that restricted adult business to the central business district of the City, with additional distance separation requirements. The court, citing *Renton* and Justice Powell's concurrence in *Young*, held that the District Court improperly considered testimony that relocation sites were cost-prohibitive. *Id.*, 928 F.2d at 283.

In *International Food and Beverage Systems v. City of Fort Lauderdale*, 794 F.2d 1520 (11th Cir. 1986), the plaintiff presented evidence that one night club operator had picked a location required by the ordinance "and it was a disaster financially." *Id.*, at 1523. Other testimony focused on prohibitively high rents. *Id.*, at 1524. The Court of Appeals advised the district court that economic impact was not a standard by which to

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(fn. continued)

> development, or legal characteristics that exclude adult businesses." *Ibid.*

This was the sole restriction of the real estate market that *Woodall* permitted, and the Ninth Circuit's drastic shrinkage of that market based on economic considerations finds no support in *Woodall*.

determine the constitutionality of the ordinance and observed that in *Renton*,

> "Justice Rehnquist does not say the city may not 'limit alternative avenues of communication' but only that it may not limit them 'unreasonably.' " *Id.*, at 1526.

The Petition should be granted to reverse the Court of Appeals judgment which is in conflict with the widespread law of other circuits.

D. The Court of Appeals Judgment Conflicts With The California Supreme Court Opinion In *National City v. Wiener*

As if conflicts with *Renton, Young, Barnes* and four other circuits were not enough, the Court of Appeals, although specifically apprised by the City of the California Supreme Court case of *City of National City v. Wiener*,[8] proceeded to construct its maverick economic analysis in direct conflict with the California high court's decision.

National City's ordinance, enacted for a municipality consisting of only 3,196 acres of available land, prohibited adult businesses from locating within 1,500 feet of another adult business, a school or a public park, or 1,000 feet of any residentially zoned property. The ordinance permitted adult businesses in retail shopping centers if the frontage faced an enclosed mall or if the business was in a mall isolated from direct view of

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[8] 3 Cal.4th 832, 12 Cal.Rptr.2d 701 (1992), *cert. den.*, No. 92-1981, __ U.S. __, 126 L.Ed.2d 53 (1993).

streets and sensitive uses (3 Cal.4th at 835-837). The California court, after comprehensively citing the principles stated in *Young* and *Renton* that prohibit the courts from concern with economic impact (*National City, supra*, 3 Cal.4th at 840, 842-843), diligently applied those principles to its determination that the National City ordinance was valid. (*Id.*, at 847-849).[9]

California cities and counties are now faced with the grim prospect that ordinances may be challenged in federal court in costly litigation involving detailed proof of the economic suitability of each parcel of land that the local government has made available for adult businesses. The need for review of the Court of Appeals decision thus goes well beyond the resolution of a parochial dispute over the propriety of an interim order. The Court of Appeals decision ranges far and wide and invades the clearly established zoning powers of California's local governments.

E. The District Court Abused Its Discretion In Granting The Preliminary Injunction

This Court stated in *Doran v. Salem Inn*, 422 U.S. 922, 931, 45 L.Ed.2d 648, 659 (1975):

> "The traditioned standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to

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[9] The California Supreme Court in *People v. Superior Court (Lucero)*, 49 Cal.3d 14, 259 Cal.Rptr. 740 (1989) cited to those portions of *Renton* that rejected the argument that sites for adult businesses had to be commercially viable (49 Cal.3d at 25, n.6).

> prevail on the merits. It is recognized, however, that a district court must weigh carefully the interests on both sides. Although only temporary, the injunction does prohibit state and local enforcement activities against the federal plaintiff pending final resolution of his case in the federal court. Such a result seriously impairs the State's interest in enforcing its criminal laws, and implicates the concerns for federalism which lie at the heart of *Younger* [*v. Harris*, 401 U.S. 37, 27 L.Ed.2d 669 (1971)]."

The standards set forth in *Doran* command reversal of the Court of Appeals. The City's ordinance is consistent with the time, place or manner regulations upheld by *Renton* and *Young*, and the balance of harms in this case favors petitioner.

1. Respondents Cannot Prevail On the Merits

Based on the law of this Court as stated in *Renton* and *Young*, and the facts already before the lower courts set forth above, respondents are not likely to prevail on the merits of their lawsuit.

The City's law on its face is consistent with the content-neutral adult business zoning ordinances sanctioned by *Young, Renton* and other circuit courts. It was enacted not to control expression but to combat the degrading effects adult businesses have on surrounding neighborhoods. Moreover, more than adequate avenues of communication exist.

As to the respondents' claims of vagueness, all except TOPANGA PRESS concede they are "adult" within the definitions of Section 12.70 and therefore have no standing under *Young*. See, *id.*, 427 U.S. at 58-59, 49 L.Ed.2d at 319. Furthermore, numerous courts have held the phrases "substantial," "significant portions of" or similar phrases in adult zoning ordinances to be sufficiently clear and definite to comply with due process. *Nortown Theatres, Inc. v. Gribbs*, 373 F.Supp. 363, 367 (E.D. Mich. 1974); *15192 Thirteen Mile Road v. City of Warren*, 626 F.Supp. 803 (E.D. Mich. 1985); *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982); *Stansberry v. Holmes*, 613 F.2d 1285, 1290 (5th Cir. 1980), *cert. den.*, 449 U.S. 886 (1980); *Hart Book Stores, Inc. v. Edmisten, supra*, 612 F.2d at 833-834.

Therefore, respondents cannot expect to prevail on the merits at trial.

2. The Balance Of Harms Decidedly Favors Petitioner

In this case, no cognizable harm can come to respondents. They are entitled to avail themselves of the exception provisions in Section 12.2A20(a), which they have not challenged. Without a determination by the City that they may not remain in their current locations, they have suffered no harm. In the event locations are found for them under the exception provisions, or if they find other locations independently, any economic disadvantage in obtaining the sites, or lack of commercial success once the businesses are relocated, is not cognizable after *Renton*.

The only type of harm that this Court has recognized in this type of case is the unreasonable diminution of

alternative avenues of communication for First Amendment expression. *Young*, 427 U.S. at 78, 49 L.Ed.2d at 330 (Powell, J., conc.). Yet nothing on the face of the ordinance or in the evidence before the trial court indicates that the City has placed any unreasonable restrictions on the location of adult businesses.

Balanced against this lack of harm to respondents is the serious harm incurred by the City by virtue of its inability to enforce these laws. Respondents' continued operation produces not only the theoretical harm based upon the "concerns for federalism" mentioned in *Doran*; the harm is palpable based on the evidence of secondary effects amassed by the City.[10]

In conclusion, the harm to the City so far outweighs any harm to respondents that the District Court's injunction was an abuse of discretion.

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[10] Nor is the harm to the City somehow alleviated because of what the lower courts have referred to as the City's "forebearance of enforcement." App. B 18, D 3. The City provided in 1986 for a two-year amortization period and a three-year extension for hardship or an extended lease. The lower courts' determination that the City's careful regulations constitute "forebearance" that diminishes the harm to the City stands these laws on their heads. This judicial policy, if it became infectious, would discourage the enactment of reasonable amortization periods.

F. The Complaints Were Not Filed Within The Statute Of Limitations For Actions Under 42 U.S.C. § 1983

The applicable statute of limitations established by *Wilson v. Garcia*, 471 U.S. 261, 85 L.Ed.2d 254 (1985), for actions filed pursuant to 42 U.S.C. § 1983 in California is one year.[11]

The adult business operators that own enterprises harboring more than one adult business are challenging the constitutionality of Ordinance No. 157,538, which became effective May 13, 1983. The applicable statute of limitations expired April 17, 1986, one year after the *Wilson* decision. STUART PARR and BRAND X first challenged the ordinance in federal court in 1989. The action in which the remainder of the respondents joined was filed in February 1991.

The most recent law challenged by respondents, Ordinance No. 161,111, establishing the 500-foot separation of adult businesses from residential zones, was effective on May 18, 1986. The one-year statute of limitations period ended in May 1987. Therefore, the complaints setting forth respondents' challenges to Ordinance No. 161,111 filed in December 1990 (STUART PARR) and in February 1991 are beyond the statute of limitations.

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[11] *Usher v. City of Los Angeles*, 828 F.2d 556 (9th Cir. 1987). For causes of action arising prior to *Wilson*, which was decided April 17, 1985, the applicable statute of limitations is either three years from the time the cause of action arises or one year from *Wilson*, depending on which period expires first. For causes of action arising after *Wilson*, the period is one year.

G. The Claims Of Respondents Made In This Case Are Not Ripe For Adjudication

In this case, respondents have asked the federal courts to intervene at a stage where no harm has come to them or can be anticipated by virtue of any application of Section 12.70. As stated previously, no respondent has asserted that it cannot find a location for a business in the City. Furthermore, no respondent has availed itself of the exception provisions in Section 12.22A20(a), which would allow them to remain in their current locations. Without any evidence that the particular respondents are presently affected in any way by the City's ordinance, this case is not ripe for adjudication.

This Court in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 18 L.Ed.2d 681, 691 (1967), set forth a two-pronged ripeness test, requiring the courts

> "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."

In *Reno v. Catholic Social Services*, __ U.S. __, 125 L.Ed.2d 38, 113 S.Ct. 2485 (1993), the Court decided that certain aliens had not demonstrated the ripeness of their challenge to Immigration and Naturalization Service regulations implementing the Immigration Reform and Control Act's provisions that allowed application for temporary and permanent residential status. The Court reasoned that, since the regulations only limited access to the benefit of residential status conferred after an alien took affirmative steps to apply under the Act, those plaintiffs who had not applied and had their application denied normally would not have an action that was ripe for adjudication. *Id.*, 125 L.Ed.2d at 56-58. In

this case, where no respondent has applied for the benefit of an exception and been rejected, the action is similarly not ripe. *See also Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 192, 87 L.Ed.2d 126, 142 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 91 L.Ed.2d 285 (1986). Therefore this case should be dismissed as prematurely brought.

CONCLUSION

The Court of Appeals in this case has directly confronted this Court on the issue of local adult business regulation. The Petition should be granted to permit Los Angeles and other local governments affected by the Court of Appeals decision to act effectively in this area again.

Dated: December 20, 1993.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CITY ATTORNEY
AND USE/ENVIRONMENT
RECEIVED
MAR 24 1993

TOPANGA PRESS, INC.; STUART PARR; BRAND X VIDEO INC.; E.W.A.P., INC.; LIBRARY ONE, INC.; HARDROCK, INC.; BEVERLY BOOKS, INC.; WHITEY, INC.; NEW WAVE, INC.; N.F.M. CORPORATION; PLUSH BOUTIQUE; CAROLINA ENTERPRISES; DASH, INC.; JOTH, INC.; JOAMAR, INC.; JAN RUBINI; 7180 SUNSET BLVD., INC.; A.L.Q. CORPORATION,
Plaintiffs-Appellees,

v.

CITY OF LOS ANGELES,
Defendant-Appellant.

No. 91-55865
D.C. No. CV-88-7838-RG
OPINION

Appeal from the United States District Court
for the Central District of California,
Richard A. Gadbois, Jr., District Judge, Presiding

Argued and Submitted
October 6, 1992—San Francisco, California

Filed March 22, 1993

Before: Dorothy W. Nelson, Stephen Reinhardt, Circuit Judges and Marion J. Callister, District Judge.*

Opinion by Judge D.W. Nelson

*The Honorable Marion J. Callister, Senior United States District Judge for the District of Idaho, sitting by designation.

COUNSEL

James K. Hahn, Claudia McGee Henry and L. Wayne Mooney, Deputy City Attorneys, Los Angeles, California, for the defendant-appellant.

G. Randall Garrou, John H. Weston, Weston, Sarno, Garrou & DeWitt, Los Angeles, California, for the plaintiffs-appellees.

OPINION

D.W. NELSON, Circuit Judge:

The City of Los Angeles ("City") appeals the district court's grant of a preliminary injunction prohibiting the City from enforcing its Adult Entertainment Business Zoning Ordinance, Los Angeles Municipal Code § 12.70, against the Appellees, owners of adult entertainment businesses ("Adult Businesses"). We affirm the order of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

In 1977, the City Department of Planning conducted a study which found that concentrations of adult entertainment businesses were creating blight in the neighborhoods where the businesses were located. In response, the City enacted Municipal Code § 12.70 in 1978. Section 12.70 prohibits adult businesses from being established, substantially enlarged, or subject to transfer of ownership within 500 feet of churches, schools, parks, or within 1,000 feet of other adult businesses. The ordinance was enacted to prevent the "continued erosion of the character of the affected neighborhoods of the City" as described by the 1977 study.

Effective May 13, 1983, the City enacted Ordinance No. 157,538 which amended § 12.70B by adding the provision that each adult business was to be considered a separate business even if it operated in conjunction with a similar business at the same establishment. In addition, the ordinance amended § 12.70C to prohibit the maintenance of more than one adult business in the same building or structure. The ordinance, however, allowed multiple businesses to continue to operate until March 10, 1985.

Effective January 13, 1984, the city council passed Ordinance No. 158,579, which forbade the establishment of any adult business within 500 feet of any residential zone. Finally, Ordinance No. 161, 111, enacted in 1986, prohibited the continued operation after March 6, 1988 of adult businesses that were in the same area as the 1983 moratorium ordinance. The 1986 ordinance also provided for the continued operation of such businesses whenever "a site consistent with 12.70C is not reasonably available elsewhere in the City for the establishment or relocation of the subject adult entertainment business." A business existing on March 6, 1986 could continue to operate until March 6, 1991 if the business could establish undue financial hardship based on investment or the existence of a written lease extending past March 6, 1988.

The Adult Businesses[1] filed a joint complaint and separate individual complaints challenging the constitutionality of zoning ordinance § 17.70. They also brought three separate motions requesting a preliminary injunction against the City's enforcement of the ordinance.[2]

Without distinguishing among the three motions, the district court ruled from the bench on June 17, 1991 that plaintiffs had met the criteria for a preliminary injunction, and enjoined the City from enforcing the ordinance.

STANDARD OF REVIEW

The City raises the preliminary issue of the Adult Businesses' standing to assert the First Amendment rights of the general public. We review standing questions *de novo*. *Conti v. City of Fremont*, 919 F.2d 1385, 1387 (9th Cir. 1990). A district court's grant or denial of a preliminary injunction will be reversed only where the district court either abused its discretion or based its decision on an erroneous legal standard. *Religious Technology Center, Church of Scientology Int'l, Inc. v. Scott*, 869 F.2d 1306, 1309 (9th Cir.) *cert. denied*, 485

[1]Many of the plaintiffs own adult bookstores and at least two own an adult cabaret and two adult theatres.

[2]The first motion joined by all twenty-two plaintiffs argued that the residency restriction: a) denied adult businesses a reasonable opportunity to relocate their businesses and thus infringed upon the plaintiffs' and the public's First Amendment rights; and b) improperly applied retroactively to pre-existing businesses. The second motion, joined by Brand X Video, Inc., Stuart Parr, New, Inc., E.W.A.P. Inc., N.F.M. Corp., Alex Wyszomirski, Beverly Books, Inc., Whitey, Inc. and Hardrock, Inc., alleged that the portion of § 12.70 which treats as separate businesses those stores which the City classifies as "multiple use" businesses: a) violates the First Amendment by indirectly outlawing certain forms of expression such as adult arcades that cannot economically operate except in conjunction with a related retail business; and b) violates the Equal Protection Clause. The third motion, joined by all twenty-two plaintiffs, argued that the ordinance is unconstitutionally vague in its definition of what constitutes an "adult" retail business.

U.S. 993 (1989). Under an abuse of discretion standard, this court cannot reverse the district court's grant of a preliminary injunction unless it has a "definite and firm conviction" that the district court committed a "clear error of judgment in the conclusion it reached." *Abatti v. Commissioner*, 859 F.2d 115, 117 (9th Cir. 1988).

ANALYSIS

I. Adult Businesses' Standing

The City contends the Adult Businesses are without standing in this court since they cannot employ the First Amendment rights of the public as a ground for the issuance of the preliminary injunction. While the Adult Businesses argue in their first motion for a preliminary injunction that enforcement of the ordinance will deny the public access to the type of entertainment they sell, the crux of their argument is that the ordinance infringes upon their *own* First Amendment rights. They argue that § 12.70 suppresses their protected speech by failing to provide them with reasonable alternative relocation sites for their businesses. Because the Adult Businesses have standing to protect their personal First Amendment rights, we need not decide whether they possess standing to assert the First Amendment rights of the public to have access to the types of expression sold by these businesses.

II. The Preliminary Injunction

In support of their motions for a preliminary injunction, the Adult Businesses argue that the City has provided them with an insufficient number of possible relocation sites and that therefore enforcement of the ordinance would cause them hardship and irreparable injury. The Adult Businesses also argue that the ordinance raises serious questions of law. The City contends that all the evidence presented by the Adult Businesses regarding their threat of hardship went to the

degree of economic harm they will face if the ordinance is enforced, and that the district court abused its discretion in considering this evidence since economic harm is not relevant to the issue of whether the Adult Businesses' First Amendment rights are threatened. The City also contends that the district court erred in finding that this case presented serious questions of law since the ordinance in question is constitutional on its face.[3]

In the context of location-restrictive ordinances, this circuit has determined that a preliminary injunction should issue upon a clear showing of either: (1) probable success on the

[3]In this case, the district court stated that the Adult Businesses had raised serious questions and that, at best, the hardships were negligible to the City. The court did not explicitly find that the hardships tipped in the Adult Businesses' favor. We note that Fed. R. Civ. P. 65(d) requires a court to "set forth the reasons for [an injunction's] issuance." If this requirement is not met, we must find that the court abused its discretion in issuing the preliminary injunction. In this instance, the district court met the requirements of rule 65(d). First, although a district court risks reversal if it fails to set forth the basis for its conclusions that serious questions of law exist, it is not essential that the court do so in every case. Sometimes, as here, the record makes the nature of the questions that the court is relying on clear beyond dispute. *See Ross-Whitney Corp.*, 207 F.2d at 198; 11 C. Wright and A. Miller, Federal Practice & Procedure § 2955, at 540-541 (1973). Second, although the court did not state explicitly that the balance of hardships tipped sharply in Appellees' favor, the statement of the court invites us to assume this finding. The court stated that the City's forbearance in enforcing the ordinance established that it would suffer no harm from the injunction. From this fact, we can infer the district court made the converse finding in respect to Appellees, namely that they faced substantial hardship if the injunction was not issued. "[W]henever, from facts found, other facts may be inferred which will support the judgment, such inferences will be deemed to have been drawn." *Wells Benz, Inc. v. United States*, 333 F.2d 89, 92 (9th Cir. 1964) (citations omitted); *see Federal Election Commission v. Furgatch*, 869 F.2d 1256, 1263 (9th Cir. 1989). This rule is consistent with the more general rule that "the findings of fact by a trial court must receive such a construction as will uphold rather than defeat its judgment." *Wells Benz, Inc.*, 333 F.2d at 92 (citations omitted). We caution, however, that the court's statement of reasons barely meets the requirements of Rule 65(d).

merits and irreparable injury; or (2) sufficiently serious questions going to the merits to make the case a fair ground for litigation and a balance of hardships tipping decidedly in favor of the party requesting relief. *Adultworld Bookstore v. City of Fresno*, 758 F.2d 1348, 1351 (9th Cir. 1985); *Ebel v. City of Corona*, 698 F.2d 390, 392 (9th Cir. 1983).

These are not two separate tests, but "merely extremes of a single continuum." *Benda v. Grand Lodge of Int'l Assoc. of Machinists & Aerospace Workers*, 584 F.2d 308, 315 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979). Thus, a moving party need not demonstrate that he risks irreparable injury, but he must at least show that he will suffer a degree of hardship that outweighs the hardship facing the opposing party if the injunction is not issued. Similarly, a moving party need not demonstrate that he will succeed on the merits, but must at least show that his cause presents serious questions of law worthy of litigation.

A. *Economic Impact Under Renton*

[1] The question of purely economic injury is not relevant to the issue of whether a moving party faces hardship if a restrictive zoning ordinance is enforced. *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984). Rather, a lower court may only consider whether enforcement of the ordinance is likely to impugn the moving party's First Amendment rights. But, "[a]ny loss of First Amendment freedoms, even briefly, can constitute irreparable injury." *Id.* 745 F.2d at 1214; *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

1. *The Renton Test*

[2] The test for determining whether the Adult Businesses' First Amendment rights are threatened is whether a local government has "effectively den[ied] . . . [the Adult Businesses] a reasonable opportunity to open and operate" their enterprise

within the city in question. *City of Renton, et al. v. Playtime Theatres*, 475 U.S. 41, 54 (1985). Again, the possible economic impact upon a business is not a factor to be considered by the courts when determining whether a city has provided a business with a reasonable alternate location. Adult businesses:

> must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees . . . . [A]lthough we have cautioned against the enactment of zoning regulations that have the 'effect of suppressing or greatly restricting access to lawful speech,' . . . we have never suggested that the First Amendment compels the Government to ensure that Adult theaters . . . will be able to obtain sites at bargain prices. . . .

Id. at 54 (citations omitted). This prohibition against consideration of economic impact specifically forecloses inquiry into whether a relocation site is "commercially viable" or only "potentially" as opposed to "actually" available. *Id.* at 53.

The Supreme Court, however, has not stated what sort of factors *may* be considered when deciding whether the relocation sites provided by a city are reasonable. Some courts have attempted to draw a distinction between economically unsuitable land and physically or practically unsuitable land. *See Woodall v. City of El Paso*, 959 F.2d 1305, 1306 (5th Cir.) (per curiam) *modifying* 950 F.2d 255 (5th Cir.), *cert. denied*, 113 S. Ct. 304 (1992); *Alexander v. City of Minneapolis*, 928 F.2d 278, 283 (8th Cir. 1991). In *Woodall*, the Fifth Circuit held that "land with physical characteristics that render it unavailable for any kind of development . . . may not be considered available for constitutional purposes under *Renton*." 959 F.2d at 1306.

The problem, however, is that the distinction between economically unsuitable and physically or practically unsuitable

land is difficult to maintain. Nearly all forms of physical and legal unsuitability may be couched in terms of economic unsuitability. Conversely, problems of economic suitability may be couched in terms of physical unsuitability. For example, in the instant case, some of the definitionally "available" land is currently used as runways for the Los Angeles airport. One could argue that this land is physically unsuitable for a business. On the other hand, one could argue that it is merely economically unsuitable, since there is nothing to prevent an adult business from physically relocating to this site; rather it is prevented by a consideration of the cost of tearing down part of an airstrip and then building a storefront. In short, it could be argued that the only impediment is the cost of development.

This easily blurred line between economic and physical suitability creates doctrinal problems. If the unsuitability of a relocation site always can be couched in terms of economic suitability, under *Renton* no relocation site could ever be considered unreasonable. On the other hand, if a court attempts artificially to maintain the line between physical and economic suitability, it may often be led to consider the economic factor *sub rosa* which is forbidden under *Renton*.

2. *The Distinction Between Consideration of Economics Within and Without the Market*

A solution to this gordian knot appears once we consider the context in which the *Renton* court forbade consideration of economic factors. Astutely, the *Woodall* court noted that "[t]he Court [in *Renton*] obviously contemplated that there was a 'market' in which businesses could purchase or lease real property on which business could be conducted." 959 F.2d at 1305. We agree with the observation of the *Woodall* court. *Renton* assumed that the relocation sites were already part of the relevant real estate market. *See e.g., Walnut Properties Inc. v. City of Whittier*, 861 F.2d 1102, 1109 (9th Cir.

1988), *cert. denied*, 490 U.S. 1006 (1989) (forbidding consideration of economic factors that stem from "market force").

[3] Accordingly, we do not think that *Renton* forbids a court to consider economics when evaluating whether a particular relocation site is in fact part of the real estate market. For purposes of *Renton*, the distinction is between consideration of economic impact *within* an actual business real estate market and consideration of cost to determine whether a specific relocation site *is part* of the relevant market. A court may not consider the former, but it may consider the latter when determining whether a specific site is reasonably suitable for the operation of a business.

3. *The Hardship Inquiry*

[4] There are two questions then that must be answered when determining whether an adult business has been given a reasonable opportunity to relocate. The first question is whether relocation sites provided to a business may be considered part of an actual business real estate market. The second question is whether, after excluding those sites that may not properly be considered to be part of the relevant real estate market, there are an adequate number of potential relocation sites for already existing businesses.

The first question is the most tricky. For the reasons stated above, we do not find the distinction between economic suitability and physical suitability helpful in answering this question. Rather, we are left to the simple, yet slippery, test of reasonableness when attempting to discern whether land is or is not part of a market in which *any* business may compete. Inquiry into the question of whether it is reasonable to consider a particular location site as part of the commercial real estate market may focus either on the physical characteristics of an area or on the cost of altering or developing the area to change its physical characteristics.

The case law offers clues as to what sort of land and/or structures reasonably may be said to comprise the relevant real estate market. *Renton* found that the city had met its obligation to provide alternate locations by providing 520 acres of land consisting of "ample accessible real estate," including "acreage in all stages of development from raw land to developed, industrial, warehouse, office and shopping space that is criss-crossed by freeways, highways, and roads." 475 U.S. at 41. *Renton* did not mention, however, that part of the 520 acres offered to the adult businesses consisted of an oil tank farm, a horse racing track and a sewage treatment facility.

Subsequent to *Renton*, the Eighth Circuit in *Alexander* refused to consider economic impact but did consider whether there were potential *commercial* sites available. The *Alexander* court concluded that "numerous sites were potentially available . . . [since] under the ordinance theaters of this sort have access to at least 6.6% of the *total acreage of commercial land*; within the available areas are a myriad of block faces, each a potential relocation site." 928 F.2d at 283. In *Dumas v. City of Dallas*, 648 F. Supp. 1061, 1071 (N.D. Tex. 1986), *aff'd*, 837 F.2d 1298 (5th Cir. 1988), *aff'd in part vacated in part*, 493 U.S. 215 (1990), the district court restated the rule against consideration of economic impact. The court then cited with approval *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1214 (5th Cir. 1982), which held that areas located among warehouses, shipyards, undeveloped areas, and swamps did not provide adult businesses with a reasonable opportunity to relocate. 648 F. Supp. at 1071. In contrast, *Dumas* noted that the plan before it permitted relocation in areas with no "impediments" except for the possibility that as a "matter of business judgment" these relocation sites were undesirable." *Id.*; *see also Function Junction, Inc. v. City of Daytona Beach*, 705 F. Supp. 544, 552 (M.D. Fla. 1987).

[5] The courts' findings in these cases lead us to hold that a particular relocation site may be considered part of the relevant real estate market when the following conditions are met.

First, although *Renton* stressed that the First Amendment only requires a relocation site to be potentially available rather than actually available, the requirement of potentiality connotes genuine possibility. The Fifth Circuit has suggested that:

> [When a] business is operated pursuant to a lease that commits the property to the present tenant for its business purposes for a term of years, the property may be effectively unavailable to adult businesses or *any other business enterprise.*

950 F.2d at 262.[4]; *cf. Alexander*, 928 F.2d 278 ("the record clearly shows that other owners of adult businesses were able to find suitable relocation sites"). We need not determine whether the Fifth Circuit is correct. Here we need determine only that property is not "potentially" available when it is unreasonable to believe that it would ever become available to any commercial enterprise.

[6] Second and focusing our attention on relocation sites which are within manufacturing or industrial zones, relocation sites that are reasonably accessible to the general public may also be part of the market. Third, areas in manufacturing zones which have a proper infra-structure such as sidewalks, roads and lighting may be included in the market. Fourth, when a relocation site suits some generic commercial enterprise, although not every particular enterprise, it too may be said to be part of the real estate market. While it is constitutionally irrelevant whether relocation sites located in industrial or manufacturing zones suit the *particular* needs of an adult business, potential sites must be reasonable relocation sites for some commercial enterprise before they can be considered part of the relevant market. Consequently, whether one defines a warehouse, a swamp, or a sewage treatment plant as physically or economically unsuitable, it is not rea-

[4]*Woodall* modified its opinion on April 21, 1992. The Fifth Circuit, however, did not disturb that portion of the original opinion quoted above.

sonable to define these sites as part of the real estate market that any business would choose.[5]

[7] Fifth, and most obvious, those relocation sites which are commercially zoned are part of the market.

We emphasize that assuming a relocation site is part of the relevant market, it is not relevant whether a relocation site will result in lost profits, higher overhead costs, or even prove to be commercially infeasible for an adult business. The issue is whether any site is part of an actual market for commercial enterprises generally.

B. *Adult Businesses' Hardship*

We turn now to the question of whether the district court in this case abused its discretion when it found that the Adult Businesses had met the hardship criterion for a preliminary injunction.[6] The City argues that the district court improperly considered the commercial viability of the potential relocation sites for the Adult Businesses. We do not agree. The record in this case indicates that a real question exists about whether the ordinance provides the Adult Businesses with constitutionally sufficient alternative relocation sites for their businesses.

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[5]We need not answer the question of whether, under *Renton*, a business has been afforded a reasonable opportunity to relocate if all relocation sites are within an industrial zone and no commercial zones are offered; in this case, the City has offered both commercial and non-commercial relocation sites.

[6]Upon the basis of the district court's finding that the City's harm was negligible, this court may infer that the district court made the requisite finding that the balance of hardships tipped sharply in the favor of the Adult Businesses. *See Wells Benz, Inc.*, 333 F.2d at 92.

1. *Excluding Offered Sites under Renton From Relevant Market*

The first issue is whether the relocation sites offered by the City are part of the business real estate market.

The Adult Businesses' geographical expert, Michael Taugher, conducted an extensive survey of the City to determine which geographical areas within the City would be permissible as potential sites for establishing or relocating these adult businesses. Mr. Taugher found that there are 11,613.1 acres of what the parties call "definitionally available" relocation sites where the City would allow an adult business to exist. Out of these 11,613.1 acres, however, Mr. Taugher concluded that much of the land was not truly available.

Mr. Taugher based his findings on what he termed "physical" or "practical" considerations. He found the following: 1) thousands of potentially available acres are submerged beneath the Pacific Ocean or the outer harbor of the Port of Los Angeles; 2) some of the land is presently being used as landing strips for the Los Angeles Airport; 3) two hundred acres are currently being used as landfill; 4) 600 acres are currently used as the Van Nuys airport; 5) 4,357.51 acres are currently used by the Port of Los Angeles and/or oil refineries; and 6) about 230 acres are used for petroleum gas storage. In addition, he found that the ITT Gilfillian Defense plant, the General Motor Assembly plant, a portion of Children's Hospital as well as other large businesses or institutions are located on "definitionally available" sites. He concluded that out of the 11613.1 acres of definitionally available land, only 7440.9 acres are "realistically available" for an adult business. Only 0.18% of this realistically available land is in a commercial zone.

Bruce Bailey, a real estate expert employed by the Appellees, used criteria similar to Mr. Taugher's. Mr. Bailey excluded those relocation sites that he considered physically

inadequate such as parcels of land now occupied by junk yards, steel yards and car storage lots. He also excluded parcels of land that were occupied by "single purpose buildings" such as shipping yards, the Los Angeles airport, and a large oil refinery complex (*id.*). Mr. Bailey concluded that there were perhaps 120 "potentially viable" relocation sites that met the requirements of the zoning ordinance.

The City contends that these experts arrived at their conclusions by considering: 1) the commercial viability of the relocation sites; and 2) whether these sites were actually as opposed to potentially available. The City is correct that at times Mr. Bailey improperly considered factors such as whether relocation sites were operatively expensive or whether adult businesses would not be welcomed by landlords. Notwithstanding this, Mr. Bailey's final estimation of available relocation sites resulted from his reliance on factors other than commercial viability.

[8] Applying the factors we have enumerated above, we believe that the areas eliminated from consideration by Mr. Taugher and Mr. Bailey are properly excluded under *Renton* since these areas do not fall within the relevant market. First, much of the land the Adult Businesses' experts considered unsuitable land is not potentially available. Land under the ocean, airstrips of international airports, and sports stadiums are not relocation sites likely to ever become available to the Adult Businesses, or indeed to any commercial business. Second, and turning to those relocation sites which are located in manufacturing zones, many of the areas excluded by Appellees' experts are not readily accessible to the public. Third, many of the sites the Adult Businesses' experts found to be unsuitable are inadequate for any generic commercial business. While *Renton* did not consider *undeveloped* land to be unsuitable for relocation, the Adult Businesses' experts testified that the City here has provided the Adult Businesses relocation sites that are *developed* in a manner totally incompatible with *any* average commercial business. Fourth,

many of the excluded relocation sites appear to lack a proper infra-structure. In short, aside from the question of commercial viability, it is unreasonable to consider the acreage eliminated from consideration by the Adult Businesses' experts as relocation sites that fall within the business real estate market.

2. *The Sufficiency of the Relocation Sites Within the Market*

Once the areas that are not part of the market are excluded, the question becomes whether the remaining acreage provides the Adult Businesses with a reasonable opportunity to relocate. The parties agree that there are presently 102 different adult entertainment businesses in the city of Los Angeles. Of these 102 existing businesses, the City located five which it believed to be in compliance with all of the various restrictions of § 12.70. The Adult Businesses' expert Mr. Taugher concluded that all but one of the 102 adult entertainment businesses could not meet the requirements of the ordinance.

At first glance, the 120 sites deemed practically available by Mr. Bailey would appear to be constitutionally sufficient, given that there are approximately only 102 adult businesses now in operation in the City of Los Angeles. Yet a more careful analysis of the evidence suggests otherwise. First, the number of businesses that need to relocate may be well higher than 102 since under the ordinance, single stores that sell two sorts of adult entertainment are to be considered multiple businesses and thus cannot operate at a single location.

Second, the estimation of the quantity of sites available within the market may well be inaccurate. Like the ordinance considered in *Walnut Properties Inc.*, 861 F.2d 1102 (9th Cir. 1989), this ordinance imposes a 1,000 foot separation requirement between any two adult businesses. This means, however, that as soon as any particular site is occupied by a new adult business, any other adult entertainment business is automatically precluded from relocating upon any other defini-

tionally available plot within a contiguous 72 acre circle around the first business.

Mr. Taugher did not work out how much acreage was available after the 1,000 foot restriction was factored in to his evaluation. However, since many of the definitionally available areas were adjacent to each other, he concluded that acreage available to the tenth or twentieth business to relocate would be "dramatically less" than the percentage of area definitionally available to the first adult business. We have not estimated the number of sites available in either the commercial or the manufacturing zones of the city. However, it is clear from the map in the record that once the 500 foot residential restriction is factored in, the definitionally available locations are clustered together in several parts of the City. There is no doubt that the 1000 foot restriction between any two adult businesses would severely reduce the actual number of potentially available relocation sites. In addition, Mr. Taugher testified that he was not sure of the accuracy of his estimate of definitionally available sites. He did not determine whether portions of existing structures that were within a "definitionally permissible" area fell within a prohibited zone.

[9] A corollary point is that there is a possibility that some of the sites included in the relevant market may be included improperly. If so, this also would reduce the number of reasonable sites potentially available. While Mr. Taugher roughly estimated the amount of land that could be considered "physically" or "practically" available, he did not determine whether there was a further decrease in available land due to factors such as inacessability, lack of proper infra-structure such as lighting, road and sidewalk access, or the presence of other disabling characteristics of the site. In sum, a risk exists that a comparison between the estimation of the total number of adult businesses and the total available acreage is misleading.

[10] Therefore, the district court did not abuse its discretion in finding that there would be serious hardship to the Adult

Businesses if an injunction against enforcement of the ordinance was not granted.

C. *City's Hardship*

Given that the Adult Businesses must not only show hardship, but that hardship tips in their favor, we turn now to the question of the potential injury to the City if the ordinance is not enforced. In *Lydo Enterprises*, this court presumed that an injunction which prevents a city from enforcing its ordinances *a fortiori* causes the City harm since "the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." 745 F.2d at 1213 (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion)). In this instance, however, the district court found that any harm the City might suffer was slight. The court noted that there had already been a "forbearance of enforcement of this regulation for a long time," implying that the City itself did not perceive enforcement of the regulation to be a matter of great urgency.

On this record, we cannot say that the district court abused its discretion in finding that the balance of hardship tipped sharply in the Adult Businesses' favor.

D. *Serious Questions of Law*

Next, we turn to the question of whether the district court erred in concluding that this case presents serious questions of law. The City argues that the district court erred because the ordinance is constitutional on its face and plaintiffs have failed to present evidence to raise any serious doubt to the contrary. We disagree. We have already concluded that the record indicates that the City may not have provided the Adult Businesses with reasonable alternative avenues of expression. This is a constitutional question which by definition is a "fair ground for litigation." *Adultworld Bookstore*, 758 F.2d at 1351. Moreover, this circuit considers zoning ordinance cases

such as this to "present complex constitutional problems." *Id.* In this particular instance, the presumption of complexity is justified given that the answer to the question of what constitutes a "reasonable opportunity to open and operate" an adult business is not free from ambiguity.

III. Attorneys' Fees

The Adult Businesses request an award of attorneys fees pursuant to 42 U.S.C. § 1988 should they prevail on appeal. Section 1988 provides that attorney fees may be awarded to a prevailing party in an action to enforce a provision of 42 U.S.C. § 1983. While the award of fees is discretionary, a court is expected to award such fees to the prevailing party unless there is some special circumstance which would justify the court's refusal. No such special circumstances exist in this case. Accordingly, we award the Adult Businesses attorneys' fees.

CONCLUSION

We conclude that the district court did not abuse its discretion in finding that the balance of hardships tips sharply in favor of the Adult Businesses. We agree with the district court that the ordinance presents serious questions of law. Accordingly, the decision of the district court to issue a preliminary injunction is affirmed. The Adult Businesses are to be awarded attorneys' fees.

AFFIRMED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TOPANGA PRESS, INC.; STUART PARR; BRAND X VIDEO INC.; E.W.A.P., INC.; LIBRARY ONE, INC.; HARDROCK, INC.; BEVERLY BOOKS, INC.; WHITEY, INC.; NEW WAVE, INC.; N.F.M. CORPORATION; PLUSH BOUTIQUE; CAROLINA ENTERPRISES; DASH, INC.; JOTH, INC.; JOAMAR, INC.; JAN RUBINI; 7180 SUNSET BLVD., INC.; A.L.Q. CORPORATION,
Plaintiffs-Appellees,

v.

CITY OF LOS ANGELES,
Defendant-Appellant.

No. 91-55865

D.C. No. CV-88-7838-RG

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California,
Richard A. Gadbois, Jr., District Judge, Presiding

Argued and Submitted
October 6, 1992—San Francisco, California

Filed March 22, 1993
Amended April 27, 1993

Before: Dorothy W. Nelson, Stephen Reinhardt, Circuit Judges and Marion J. Callister, District Judge.*

Opinion by Judge D.W. Nelson

*The Honorable Marion J. Callister, Senior United States District Judge for the District of Idaho, sitting by designation.

COUNSEL

James K. Hahn, Claudia McGee Henry and L. Wayne Mooney, Deputy City Attorneys, Los Angeles, California, for the defendant-appellant.

G. Randall Garrou, John H. Weston, Weston, Sarno, Garrou & DeWitt, Los Angeles, California, for the plaintiffs-appellees.

ORDER

The opinion filed March 22, 1993, slip op. 2549, is amended as follows:

1. At slip op. 2553, second paragraph, delete the last sentence which begins "The ordinance . . . ." Insert following: "The ordinance, however, allowed multiple businesses established on or after September 1, 1978 to continue to operate until March 10, 1985, with an additional provision respecting the

"grandfathering" of businesses established before September 1, 1978."

2. At slip op. 2553, third paragraph, first sentence, insert "new" after "any" and before "adult businesses within . . . ."

3. At slip op. 2553, third paragraph, second sentence delete "that were in the same area as the 1983 moratorium ordinance." Insert "located within 500 feet of a residential zone."

4. At slip op. 2556, footnote 3, strike the entire text of footnote. Insert in its place the following: "The district court's preliminary injunction expressly found that the adult businesses had raised "substantial and non-frivolous legal and factual issues" and that "the balance of hardships tips decidedly in favor of plaintiffs."

5. At slip op. 2563, footnote 6, strike entire footnote.

OPINION

D.W. NELSON, Circuit Judge:

The City of Los Angeles ("City") appeals the district court's grant of a preliminary injunction prohibiting the City from enforcing its Adult Entertainment Business Zoning Ordinance, Los Angeles Municipal Code § 12.70, against the Appellees, owners of adult entertainment businesses ("Adult Businesses"). We affirm the order of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

In 1977, the City Department of Planning conducted a study which found that concentrations of adult entertainment businesses were creating blight in the neighborhoods where

the businesses were located. In response, the City enacted Municipal Code § 12.70 in 1978. Section 12.70 prohibits adult businesses from being established, substantially enlarged, or subject to transfer of ownership within 500 feet of churches, schools, parks, or within 1,000 feet of other adult businesses. The ordinance was enacted to prevent the "continued erosion of the character of the affected neighborhoods of the City" as described by the 1977 study.

Effective May 13, 1983, the City enacted Ordinance No. 157,538 which amended § 12.70B by adding the provision that each adult business was to be considered a separate business even if it operated in conjunction with a similar business at the same establishment. In addition, the ordinance amended § 12.70C to prohibit the maintenance of more than one adult business in the same building or structure. The ordinance, however, allowed multiple businesses established on or after September 1, 1978 to continue to operate until March 10, 1985, with an additional provision respecting the "grandfathering" of businesses established before September 1, 1978.

Effective January 13, 1984, the city council passed Ordinance No. 158,579, which forbade the establishment of any new adult business within 500 feet of any residential zone. Finally, Ordinance No. 161, 111, enacted in 1986, prohibited the continued operation after March 6, 1988 of adult businesses located within 500 feet of a residential zone. The 1986 ordinance also provided for the continued operation of such businesses whenever "a site consistent with 12.70C is not reasonably available elsewhere in the City for the establishment or relocation of the subject adult entertainment business." A business existing on March 6, 1986 could continue to operate until March 6, 1991 if the business could establish undue financial hardship based on investment or the existence of a written lease extending past March 6, 1988.

The Adult Businesses[1] filed a joint complaint and separate individual complaints challenging the constitutionality of zoning ordinance § 17.70. They also brought three separate motions requesting a preliminary injunction against the City's enforcement of the ordinance.[2]

Without distinguishing among the three motions, the district court ruled from the bench on June 17, 1991 that plaintiffs had met the criteria for a preliminary injunction, and enjoined the City from enforcing the ordinance.

STANDARD OF REVIEW

The City raises the preliminary issue of the Adult Businesses' standing to assert the First Amendment rights of the general public. We review standing questions *de novo*. *Conti v. City of Fremont*, 919 F.2d 1385, 1387 (9th Cir. 1990). A district court's grant or denial of a preliminary injunction will be reversed only where the district court either abused its discretion or based its decision on an erroneous legal standard. *Religious Technology Center, Church of Scientology Int'l, Inc. v. Scott*, 869 F.2d 1306, 1309 (9th Cir.) *cert. denied*, 485

[1]Many of the plaintiffs own adult bookstores and at least two own an adult cabaret and two adult theatres.

[2]The first motion joined by all twenty-two plaintiffs argued that the residency restriction: a) denied adult businesses a reasonable opportunity to relocate their businesses and thus infringed upon the plaintiffs' and the public's First Amendment rights; and b) improperly applied retroactively to pre-existing businesses. The second motion, joined by Brand X Video, Inc., Stuart Parr, New, Inc., E.W.A.P. Inc., N.F.M. Corp., Alex Wyszomirski, Beverly Books, Inc., Whitey, Inc. and Hardrock, Inc., alleged that the portion of § 12.70 which treats as separate businesses those stores which the City classifies as "multiple use" businesses: a) violates the First Amendment by indirectly outlawing certain forms of expression such as adult arcades that cannot economically operate except in conjunction with a related retail business; and b) violates the Equal Protection Clause. The third motion, joined by all twenty-two plaintiffs, argued that the ordinance is unconstitutionally vague in its definition of what constitutes an "adult" retail business.

U.S. 993 (1989). Under an abuse of discretion standard, this court cannot reverse the district court's grant of a preliminary injunction unless it has a "definite and firm conviction" that the district court committed a "clear error of judgment in the conclusion it reached." *Abatti v. Commissioner*, 859 F.2d 115, 117 (9th Cir. 1988).

ANALYSIS

I. Adult Businesses' Standing

The City contends the Adult Businesses are without standing in this court since they cannot employ the First Amendment rights of the public as a ground for the issuance of the preliminary injunction. While the Adult Businesses argue in their first motion for a preliminary injunction that enforcement of the ordinance will deny the public access to the type of entertainment they sell, the crux of their argument is that the ordinance infringes upon their *own* First Amendment rights. They argue that § 12.70 suppresses their protected speech by failing to provide them with reasonable alternative relocation sites for their businesses. Because the Adult Businesses have standing to protect their personal First Amendment rights, we need not decide whether they possess standing to assert the First Amendment rights of the public to have access to the types of expression sold by these businesses.

II. The Preliminary Injunction

In support of their motions for a preliminary injunction, the Adult Businesses argue that the City has provided them with an insufficient number of possible relocation sites and that therefore enforcement of the ordinance would cause them hardship and irreparable injury. The Adult Businesses also argue that the ordinance raises serious questions of law. The City contends that all the evidence presented by the Adult Businesses regarding their threat of hardship went to the

degree of economic harm they will face if the ordinance is enforced, and that the district court abused its discretion in considering this evidence since economic harm is not relevant to the issue of whether the Adult Businesses' First Amendment rights are threatened. The City also contends that the district court erred in finding that this case presented serious questions of law since the ordinance in question is constitutional on its face.[3]

In the context of location-restrictive ordinances, this circuit has determined that a preliminary injunction should issue upon a clear showing of either: (1) probable success on the merits and irreparable injury; or (2) sufficiently serious questions going to the merits to make the case a fair ground for litigation and a balance of hardships tipping decidedly in favor of the party requesting relief. *Adultworld Bookstore v. City of Fresno*, 758 F.2d 1348, 1351 (9th Cir. 1985); *Ebel v. City of Corona*, 698 F.2d 390, 392 (9th Cir. 1983).

These are not two separate tests, but "merely extremes of a single continuum." *Benda v. Grand Lodge of Int'l Assoc. of Machinists & Aerospace Workers*, 584 F.2d 308, 315 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979). Thus, a moving party need not demonstrate that he risks irreparable injury, but he must at least show that he will suffer a degree of hardship that outweighs the hardship facing the opposing party if the injunction is not issued. Similarly, a moving party need not demonstrate that he will succeed on the merits, but must at least show that his cause presents serious questions of law worthy of litigation.

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[3]The district court's preliminary injunction expressly found that the adult businesses had raised "substantial and non-frivolous legal and factual issues" and that "the balance of hardships tips decidedly in favor of plaintiffs."

A. *Economic Impact Under Renton*

[1] The question of purely economic injury is not relevant to the issue of whether a moving party faces hardship if a restrictive zoning ordinance is enforced. *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984). Rather, a lower court may only consider whether enforcement of the ordinance is likely to impugn the moving party's First Amendment rights. But, "[a]ny loss of First Amendment freedoms, even briefly, can constitute irreparable injury." *Id.* 745 F.2d at 1214; *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

1. *The Renton Test*

[2] The test for determining whether the Adult Businesses' First Amendment rights are threatened is whether a local government has "effectively den[ied] . . . [the Adult Businesses] a reasonable opportunity to open and operate" their enterprise within the city in question. *City of Renton, et al. v. Playtime Theatres*, 475 U.S. 41, 54 (1985). Again, the possible economic impact upon a business is not a factor to be considered by the courts when determining whether a city has provided a business with a reasonable alternate location. Adult businesses:

> must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees . . . . [A]lthough we have cautioned against the enactment of zoning regulations that have the 'effect of suppressing or greatly restricting access to lawful speech,' . . . we have never suggested that the First Amendment compels the Government to ensure that Adult theaters . . . will be able to obtain sites at bargain prices. . . .

Id. at 54 (citations omitted). This prohibition against consideration of economic impact specifically forecloses inquiry into

whether a relocation site is "commercially viable" or only "potentially" as opposed to "actually" available. *Id.* at 53.

The Supreme Court, however, has not stated what sort of factors *may* be considered when deciding whether the relocation sites provided by a city are reasonable. Some courts have attempted to draw a distinction between economically unsuitable land and physically or practically unsuitable land. *See Woodall v. City of El Paso*, 959 F.2d 1305, 1306 (5th Cir.) (per curiam) *modifying* 950 F.2d 255 (5th Cir.), *cert. denied*, 113 S. Ct. 304 (1992); *Alexander v. City of Minneapolis*, 928 F.2d 278, 283 (8th Cir. 1991). In *Woodall*, the Fifth Circuit held that "land with physical characteristics that render it unavailable for any kind of development . . . may not be considered available for constitutional purposes under *Renton*." 959 F.2d at 1306.

The problem, however, is that the distinction between economically unsuitable and physically or practically unsuitable land is difficult to maintain. Nearly all forms of physical and legal unsuitability may be couched in terms of economic unsuitability. Conversely, problems of economic suitability may be couched in terms of physical unsuitability. For example, in the instant case, some of the definitionally "available" land is currently used as runways for the Los Angeles airport. One could argue that this land is physically unsuitable for a business. On the other hand, one could argue that it is merely economically unsuitable, since there is nothing to prevent an adult business from physically relocating to this site; rather it is prevented by a consideration of the cost of tearing down part of an airstrip and then building a storefront. In short, it could be argued that the only impediment is the cost of development.

This easily blurred line between economic and physical suitability creates doctrinal problems. If the unsuitability of a relocation site always can be couched in terms of economic suitability, under *Renton* no relocation site could ever be con-

sidered unreasonable. On the other hand, if a court attempts artificially to maintain the line between physical and economic suitability, it may often be led to consider the economic factor *sub rosa* which is forbidden under *Renton*.

2. *The Distinction Between Consideration of Economics Within and Without the Market*

A solution to this gordian knot appears once we consider the context in which the *Renton* court forbade consideration of economic factors. Astutely, the *Woodall* court noted that "[t]he Court [in *Renton*] obviously contemplated that there was a 'market' in which businesses could purchase or lease real property on which business could be conducted." 959 F.2d at 1305. We agree with the observation of the *Woodall* court. *Renton* assumed that the relocation sites were already part of the relevant real estate market. *See e.g., Walnut Properties Inc. v. City of Whittier*, 861 F.2d 1102, 1109 (9th Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989) (forbidding consideration of economic factors that stem from "market force").

[3] Accordingly, we do not think that *Renton* forbids a court to consider economics when evaluating whether a particular relocation site is in fact part of the real estate market. For purposes of *Renton*, the distinction is between consideration of economic impact *within* an actual business real estate market and consideration of cost to determine whether a specific relocation site *is part* of the relevant market. A court may not consider the former, but it may consider the latter when determining whether a specific site is reasonably suitable for the operation of a business.

3. *The Hardship Inquiry*

[4] There are two questions then that must be answered when determining whether an adult business has been given a reasonable opportunity to relocate. The first question is whether relocation sites provided to a business may be con-

sidered part of an actual business real estate market. The second question is whether, after excluding those sites that may not properly be considered to be part of the relevant real estate market, there are an adequate number of potential relocation sites for already existing businesses.

The first question is the most tricky. For the reasons stated above, we do not find the distinction between economic suitability and physical suitability helpful in answering this question. Rather, we are left to the simple, yet slippery, test of reasonableness when attempting to discern whether land is or is not part of a market in which *any* business may compete. Inquiry into the question of whether it is reasonable to consider a particular location site as part of the commercial real estate market may focus either on the physical characteristics of an area or on the cost of altering or developing the area to change its physical characteristics.

The case law offers clues as to what sort of land and/or structures reasonably may be said to comprise the relevant real estate market. *Renton* found that the city had met its obligation to provide alternate locations by providing 520 acres of land consisting of "ample accessible real estate," including "acreage in all stages of development from raw land to developed, industrial, warehouse, office and shopping space that is criss-crossed by freeways, highways, and roads." 475 U.S. at 41. *Renton* did not mention, however, that part of the 520 acres offered to the adult businesses consisted of an oil tank farm, a horse racing track and a sewage treatment facility.

Subsequent to *Renton*, the Eighth Circuit in *Alexander* refused to consider economic impact but did consider whether there were potential *commercial* sites available. The *Alexander* court concluded that "numerous sites were potentially available . . . [since] under the ordinance theaters of this sort have access to at least 6.6% of the *total acreage of commercial land*; within the available areas are a myriad of block faces, each a potential relocation site." 928 F.2d at 283. In

Dumas v. City of Dallas, 648 F. Supp. 1061, 1071 (N.D. Tex. 1986), *aff'd*, 837 F.2d 1298 (5th Cir. 1988), *aff'd in part vacated in part*, 493 U.S. 215 (1990), the district court restated the rule against consideration of economic impact. The court then cited with approval *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1214 (5th Cir. 1982), which held that areas located among warehouses, shipyards, undeveloped areas, and swamps did not provide adult businesses with a reasonable opportunity to relocate. 648 F. Supp. at 1071. In contrast, *Dumas* noted that the plan before it permitted relocation in areas with no "impediments" except for the possibility that as a "matter of business judgment" these relocation sites were undesirable." *Id.*; *see also Function Junction, Inc. v. City of Daytona Beach*, 705 F. Supp. 544, 552 (M.D. Fla. 1987).

[5] The courts' findings in these cases lead us to hold that a particular relocation site may be considered part of the relevant real estate market when the following conditions are met. First, although *Renton* stressed that the First Amendment only requires a relocation site to be potentially available rather than actually available, the requirement of potentiality connotes genuine possibility. The Fifth Circuit has suggested that:

> [When a] business is operated pursuant to a lease that commits the property to the present tenant for its business purposes for a term of years, the property may be effectively unavailable to adult businesses or *any other business enterprise.*

950 F.2d at 262.[4]; *cf. Alexander*, 928 F.2d 278 ("the record clearly shows that other owners of adult businesses were able to find suitable relocation sites"). We need not determine whether the Fifth Circuit is correct. Here we need determine only that property is not "potentially" available when it is

[4]*Woodall* modified its opinion on April 21, 1992. The Fifth Circuit, however, did not disturb that portion of the original opinion quoted above.

unreasonable to believe that it would ever become available to any commercial enterprise.

[6] Second and focusing our attention on relocation sites which are within manufacturing or industrial zones, relocation sites that are reasonably accessible to the general public may also be part of the market. Third, areas in manufacturing zones which have a proper infra-structure such as sidewalks, roads and lighting may be included in the market. Fourth, when a relocation site suits some generic commercial enterprise, although not every particular enterprise, it too may be said to be part of the real estate market. While it is constitutionally irrelevant whether relocation sites located in industrial or manufacturing zones suit the *particular* needs of an adult business, potential sites must be reasonable relocation sites for some commercial enterprise before they can be considered part of the relevant market. Consequently, whether one defines a warehouse, a swamp, or a sewage treatment plant as physically or economically unsuitable, it is not reasonable to define these sites as part of the real estate market that any business would choose.[5]

[7] Fifth, and most obvious, those relocation sites which are commercially zoned are part of the market.

We emphasize that assuming a relocation site is part of the relevant market, it is not relevant whether a relocation site will result in lost profits, higher overhead costs, or even prove to be commercially infeasible for an adult business. The issue is whether any site is part of an actual market for commercial enterprises generally.

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[5]We need not answer the question of whether, under *Renton*, a business has been afforded a reasonable opportunity to relocate if all relocation sites are within an industrial zone and no commercial zones are offered; in this case, the City has offered both commercial and non-commercial relocation sites.

B. *Adult Businesses' Hardship*

We turn now to the question of whether the district court in this case abused its discretion when it found that the Adult Businesses had met the hardship criterion for a preliminary injunction. The City argues that the district court improperly considered the commercial viability of the potential relocation sites for the Adult Businesses. We do not agree. The record in this case indicates that a real question exists about whether the ordinance provides the Adult Businesses with constitutionally sufficient alternative relocation sites for their businesses.

1. *Excluding Offered Sites under Renton From Relevant Market*

The first issue is whether the relocation sites offered by the City are part of the business real estate market.

The Adult Businesses' geographical expert, Michael Taugher, conducted an extensive survey of the City to determine which geographical areas within the City would be permissible as potential sites for establishing or relocating these adult businesses. Mr. Taugher found that there are 11,613.1 acres of what the parties call "definitionally available" relocation sites where the City would allow an adult business to exist. Out of these 11,613.1 acres, however, Mr. Taugher concluded that much of the land was not truly available.

Mr. Taugher based his findings on what he termed "physical" or "practical" considerations. He found the following: 1) thousands of potentially available acres are submerged beneath the Pacific Ocean or the outer harbor of the Port of Los Angeles; 2) some of the land is presently being used as landing strips for the Los Angeles Airport; 3) two hundred acres are currently being used as landfill; 4) 600 acres are currently used as the Van Nuys airport; 5) 4,357.51 acres are currently used by the Port of Los Angeles and/or oil refineries;

and 6) about 230 acres are used for petroleum gas storage. In addition, he found that the ITT Gilfillian Defense plant, the General Motor Assembly plant, a portion of Children's Hospital as well as other large businesses or institutions are located on "definitionally available" sites. He concluded that out of the 11613.1 acres of definitionally available land, only 7440.9 acres are "realistically available" for an adult business. Only 0.18% of this realistically available land is in a commercial zone.

Bruce Bailey, a real estate expert employed by the Appellees, used criteria similar to Mr. Taugher's. Mr. Bailey excluded those relocation sites that he considered physically inadequate such as parcels of land now occupied by junk yards, steel yards and car storage lots. He also excluded parcels of land that were occupied by "single purpose buildings" such as shipping yards, the Los Angeles airport, and a large oil refinery complex (*id.*). Mr. Bailey concluded that there were perhaps 120 "potentially viable" relocation sites that met the requirements of the zoning ordinance.

The City contends that these experts arrived at their conclusions by considering: 1) the commercial viability of the relocation sites; and 2) whether these sites were actually as opposed to potentially available. The City is correct that at times Mr. Bailey improperly considered factors such as whether relocation sites were operatively expensive or whether adult businesses would not be welcomed by landlords. Notwithstanding this, Mr. Bailey's final estimation of available relocation sites resulted from his reliance on factors other than commercial viability.

[8] Applying the factors we have enumerated above, we believe that the areas eliminated from consideration by Mr. Taugher and Mr. Bailey are properly excluded under *Renton* since these areas do not fall within the relevant market. First, much of the land the Adult Businesses' experts considered unsuitable land is not potentially available. Land under the

ocean, airstrips of international airports, and sports stadiums are not relocation sites likely to ever become available to the Adult Businesses, or indeed to any commercial business. Second, and turning to those relocation sites which are located in manufacturing zones, many of the areas excluded by Appellees' experts are not readily accessible to the public. Third, many of the sites the Adult Businesses' experts found to be unsuitable are inadequate for any generic commercial business. While *Renton* did not consider *undeveloped* land to be unsuitable for relocation, the Adult Businesses' experts testified that the City here has provided the Adult Businesses relocation sites that are *developed* in a manner totally incompatible with *any* average commercial business. Fourth, many of the excluded relocation sites appear to lack a proper infra-structure. In short, aside from the question of commercial viability, it is unreasonable to consider the acreage eliminated from consideration by the Adult Businesses' experts as relocation sites that fall within the business real estate market.

2. *The Sufficiency of the Relocation Sites Within the Market*

Once the areas that are not part of the market are excluded, the question becomes whether the remaining acreage provides the Adult Businesses with a reasonable opportunity to relocate. The parties agree that there are presently 102 different adult entertainment businesses in the city of Los Angeles. Of these 102 existing businesses, the City located five which it believed to be in compliance with all of the various restrictions of § 12.70. The Adult Businesses' expert Mr. Taugher concluded that all but one of the 102 adult entertainment businesses could not meet the requirements of the ordinance.

At first glance, the 120 sites deemed practically available by Mr. Bailey would appear to be constitutionally sufficient, given that there are approximately only 102 adult businesses now in operation in the City of Los Angeles. Yet a more careful analysis of the evidence suggests otherwise. First, the

number of businesses that need to relocate may be well higher than 102 since under the ordinance, single stores that sell two sorts of adult entertainment are to be considered multiple businesses and thus cannot operate at a single location.

Second, the estimation of the quantity of sites available within the market may well be inaccurate. Like the ordinance considered in *Walnut Properties Inc.*, 861 F.2d 1102 (9th Cir. 1989), this ordinance imposes a 1,000 foot separation requirement between any two adult businesses. This means, however, that as soon as any particular site is occupied by a new adult business, any other adult entertainment business is automatically precluded from relocating upon any other definitionally available plot within a contiguous 72 acre circle around the first business.

Mr. Taugher did not work out how much acreage was available after the 1,000 foot restriction was factored in to his evaluation. However, since many of the definitionally available areas were adjacent to each other, he concluded that acreage available to the tenth or twentieth business to relocate would be "dramatically less" than the percentage of area definitionally available to the first adult business. We have not estimated the number of sites available in either the commercial or the manufacturing zones of the city. However, it is clear from the map in the record that once the 500 foot residential restriction is factored in, the definitionally available locations are clustered together in several parts of the City. There is no doubt that the 1000 foot restriction between any two adult businesses would severely reduce the actual number of potentially available relocation sites. In addition, Mr. Taugher testified that he was not sure of the accuracy of his estimate of definitionally available sites. He did not determine whether portions of existing structures that were within a "definitionally permissible" area fell within a prohibited zone.

[9] A corollary point is that there is a possibility that some of the sites included in the relevant market may be included

improperly. If so, this also would reduce the number of reasonable sites potentially available. While Mr. Taugher roughly estimated the amount of land that could be considered "physically" or "practically" available, he did not determine whether there was a further decrease in available land due to factors such as inacessability, lack of proper infra-structure such as lighting, road and sidewalk access, or the presence of other disabling characteristics of the site. In sum, a risk exists that a comparison between the estimation of the total number of adult businesses and the total available acreage is misleading.

[10] Therefore, the district court did not abuse its discretion in finding that there would be serious hardship to the Adult Businesses if an injunction against enforcement of the ordinance was not granted.

C. *City's Hardship*

Given that the Adult Businesses must not only show hardship, but that hardship tips in their favor, we turn now to the question of the potential injury to the City if the ordinance is not enforced. In *Lydo Enterprises*, this court presumed that an injunction which prevents a city from enforcing its ordinances *a fortiori* causes the City harm since "the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." 745 F.2d at 1213 (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion)). In this instance, however, the district court found that any harm the City might suffer was slight. The court noted that there had already been a "forbearance of enforcement of this regulation for a long time," implying that the City itself did not perceive enforcement of the regulation to be a matter of great urgency.

On this record, we cannot say that the district court abused its discretion in finding that the balance of hardship tipped sharply in the Adult Businesses' favor.

D. *Serious Questions of Law*

Next, we turn to the question of whether the district court erred in concluding that this case presents serious questions of law. The City argues that the district court erred because the ordinance is constitutional on its face and plaintiffs have failed to present evidence to raise any serious doubt to the contrary. We disagree. We have already concluded that the record indicates that the City may not have provided the Adult Businesses with reasonable alternative avenues of expression. This is a constitutional question which by definition is a "fair ground for litigation." *Adultworld Bookstore*, 758 F.2d at 1351. Moreover, this circuit considers zoning ordinance cases such as this to "present complex constitutional problems." *Id.* In this particular instance, the presumption of complexity is justified given that the answer to the question of what constitutes a "reasonable opportunity to open and operate" an adult business is not free from ambiguity.

III. Attorneys' Fees

The Adult Businesses request an award of attorneys fees pursuant to 42 U.S.C. § 1988 should they prevail on appeal. Section 1988 provides that attorney fees may be awarded to a prevailing party in an action to enforce a provision of 42 U.S.C. § 1983. While the award of fees is discretionary, a court is expected to award such fees to the prevailing party unless there is some special circumstance which would justify the court's refusal. No such special circumstances exist in this case. Accordingly, we award the Adult Businesses attorneys' fees.

CONCLUSION

We conclude that the district court did not abuse its discretion in finding that the balance of hardships tips sharply in favor of the Adult Businesses. We agree with the district court that the ordinance presents serious questions of law. Accord-

ingly, the decision of the district court to issue a preliminary injunction is affirmed. The Adult Businesses are to be awarded attorneys' fees.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
AUG 31 1993
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

TOPANGA PRESS, INC.; STUART PARR; BRAND X VIDEO, INC.; E.W.A.P., INC.; LIBRARY ONE, INC.; HARDROCK, INC.; BEVERLY BOOKS, INC.; WHITEY, INC.; NEW WAVE, INC.; N.F.M. CORPORATION; PLUSH BOUTIQUE; CAROLINA ENTERPRISES; DASH, INC.; JOTH, INC.; JOAMAR, INC.; JAN RUBINI; 7180 SUNSET BLVD., INC.; A.L.Q. CORPORATION,

Plaintiffs-Appellees,

v.

CITY OF LOS ANGELES,

Defendant-Appellant.

No. 91-55865
D.C. No. CV-88-7838-RG

ORDER

Before: D. W. NELSON and REINHARDT, Circuit Judges, and CALLISTER, District Judge*

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* The Honorable Marion J. Callister, Senior United States District Judge for the District of Idaho, sitting by designation.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judges D.W. Nelson and Reinhardt voted to reject the suggestion for rehearing en banc. Judge Callister recommended the suggestion for rehearing en banc be rejected.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
SEP 20 1993
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

TOPANGA PRESS, INC.; STUART PARR; BRAND X VIDEO, INC.; E.W.A.P., INC.; LIBRARY ONE, INC.; HARDROCK, INC.; BEVERLY BOOKS, INC.; WHITEY, INC.; NEW WAVE, INC.; N.F.M. CORPORATION; PLUSH BOUTIQUE; CAROLINA ENTERPRISES; DASH, INC.; JOTH, INC.; JOAMAR, INC.; JAN RUBINI; 7180 SUNSET BLVD., INC.; A.L.Q. CORPORATION,

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CITY OF LOS ANGELES,

Defendant-Appellant.

No. 91-55865
D.C. No. CV-88-7838-RG

ORDER

Before: D. W. NELSON and REINHARDT, Circuit Judges, and CALLISTER, District Judge*

The members of the panel that decided this case voted unanimously to deny the petition for rehearing which was received by this court on July 6, 1993.

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* The Honorable Marion J. Callister, Senior United States District Judge for the District of Idaho, sitting by designation.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

- - -

HONORABLE RICHARD A. GADBOIS, JR.,
JUDGE PRESIDING

- - -

TOPANGA PRESS, INC., a
California corporation, et al.,
Plaintiff,

vs.

CITY OF LOS ANGELES,
a municipal corporation,
Defendant.

No. CV 88-7838-RG

[PARTIAL]
REPORTER'S TRANSCRIPT OF PROCEEDINGS
Los Angeles, California
Monday, June 17, 1991

LEONORE A. LeBLANC, CSR 2525
Official Reporter
455 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
(213) 617-3071

* * *

THE COURT: All right. Both the motions to dismiss and to abstain are nevertheless denied.

Do you want to talk about the preliminary injunction now?

* * *

We might save each other a little bit of time if I tell you that it strikes me that the residential proximity challenge, in terms of the claim of unavailable land, is something that requires evidence to be taken.

* * *

THE COURT: I'll tell you what my position is. It's my intention to preliminarily enjoin the enforcement of the ordinance until we have a trial on this issue of residential proximity, which I think we can have in a matter of some weeks. There isn't any harm to the City, in that the City has forborne itself by reason of the extension and other non-action in this matter, and I see no reason why it can't be resolved within sixty days or so.

* * *

MR. MOONEY: So the trial would relate to all the issues raised —

THE COURT: Yes. Although only one of them really is a factual issue and that is the residential proximity and the availability of any land. I'm prepared

to rule on all of it at the same time, although the other two things are entirely legal, as I perceive them.

* * *

THE COURT: They have raised serious questions. There's no doubt about that. And the hardships are negligible to the City, if any at all, in the sense that there has been a forbearance of enforcement of this regulation for a long time, and I'm going to get to the issue real quickly. I don't want to talk about likelihood of success on the merits. I don't think I have to, because all I have to do is recognize that there are some very serious questions raised here.

* * *

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Beverly Hills, CA 90210
(213) 550-7460

Attorneys for all plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT
OF CALIFORNIA

TOPANGA PRESS, INC., *et al.*,
Plaintiffs,
v.
CITY OF LOS ANGELES, a
municipal corporation, *et al.*,
Defendants.

Case No. CV-88-7838 RG (Kx)

(Consolidated with:
Case No. CV 89-2069 RG;
Case No. CV 89-3791 RG;
Case No. CV 91-0689 RG;
Case No. CV 91-1035 RG;
Case No. CV 91-1122 RG; and
Case No. CV 91-1653 RG)

PRELIMINARY INJUNCTION

Plaintiffs' three motions for preliminary injunction against enforcement of various aspects of L.A.M.C.

§ 12.70 came on for hearing before this court on June 17, 1991. Appearing as attorneys were: G. Randall Garrou and Robert A. Sarno of Weston & Sarno for plaintiffs, and L. Wayne Mooney, Deputy City Attorney, as attorney for defendant CITY OF LOS ANGELES.

Based upon the numerous declarations, exhibits and memoranda filed with the Court by both sides, and based upon the argument presented at the hearing on these motions, this Court finds that plaintiffs have raised a number of substantial and non-frivolous legal and factual issues in support of their challenge to the constitutionality of this ordinance, some of which can only be resolved after a trial on the merits. The Court further finds that the balance of hardships tips decidedly in favor of plaintiffs as they will be forced to cease their First amendment-protected activities or be subject to the possibility of immediate criminal prosecution under this ordinance absent injunctive relief from this Court. In contrast, the City will not suffer comparable harm if the status quo is merely preserved until the merits of plaintiffs numerous challenges can be finally determined at trial.

By this ruling, the Court initmates [*sic*] no view as to whether plaintiffs are likely to ultimately succeed on the merits. It merely finds that principles of equity demand preservation of the status quo pending trial.

THEREFORE, IT IS HEREBY ORDERED:

During the pendency of this action or until further court order, defendant CITY OF LOS ANGELES and its officers, employees, agents, attorneys and representatives, and all persons acting in concert or participating with them are enjoined from:

(1) instituting any civil, criminal or administrative proceedings against plaintiffs or their shareholders, officers,

agents or employees for conducting an "adult bookstore", "adult arcade", "adult cabaret" or an "adult theatre" at any of the following locations in alleged violation of those portions of Los Angeles Municipal Code § 12.70C prohibiting establishment or operation of an adult entertainment business within 500 feet of a residential zone: TOPANGA PRESS, INC.'s store located at 7566 Melrose Avenue; STUART PARR's store located at 6408 Tujunga Avenue; BRAND X VIDEO, INC.'s store located at 6161 Van Nuys Blvd.; E.W.A.P., INC.'s stores located at 12323 Ventura Blvd.; 4877 Lankershim Blvd.; 4459 W. Sunset Blvd.; 4539 Van Nuys Blvd.; and 21625 Sherman Way; LIBRARY ONE, INC.'s store located at 752 Alvarado Blvd.; HARDROCK, INC.'s store located at 10930 Vanowen; BEVERLY BOOKS, INC.'s store located at 5507 Hollywood Blvd.; WHITEY, INC.'s store located at 10654 Magnolia Blvd.; NEW WAVE, INC.'s business located at 6452 Lankershim Blvd.; N.F.M. CORPORATION's store located at 15452 Devonshire St.; PLUSH BOUTIQUE a d/b/a/ of Alex Wyszomirski located at 5601 W. Century Blvd.; CAROLINA ENTERPRISES, INC.'s business located at 5601 W. Century Blvd.; DASH, INC.'s business located at 8532 Sepulveda Blvd.; JOTH, INC.'s business located at 21625 Devonshire; JOAMAR, INC.'s business located at 6816-18 Winnetka; JAN RUBINI's bookstore

located at 12300 1/2 W. Pico Blvd.; 7180 SUNSET BLVD., INC.'s business located at 7180 Sunset Blvd.; and A.L.Q. CORPORATION's business located at 365 N. La Cienega Blvd., all in the City of Los Angeles; and

(2) instituting any civil, criminal or administrative proceedings against plaintiffs or their shareholders, officers, agents or employees for conducting an "adult bookstore", "adult arcade", "adult cabaret" or an "adult theatre" at any of the following locations, in alleged violation of those portions of L.A.M.C. § 12.70 prohibiting more than one adult entertainment business in the same building or portion thereof or within 1,000 feet of another "adult" business based upon a construction of the ordinance which applies to activities conducted exclusively within a single store or business: STUART PARR's store located at 6408 Tujunga Avenue; BRAND X VIDEO, INC.'s store located at 6161 Van Nuys Blvd.; NEW WAVE, INC.'s business located at 6452 Lankershim Blvd.; E.W.A.P., INC.'s, stores located at 12323 Ventura Blvd.; 4877 Lankershim Blvd.; 4459 W. Sunset Blvd.; 4539 Van Nuys Blvd; and 21625 Sherman Way; LIBRARY ONE, INC.'s store located at 752 Alvarado Blvd.; HARDROCK, INC.'s store located at 10930 Vanowen; BEVERLY BOOKS, INC.'s store located at 5507 Hollywood Blvd.; WHITEY, INC.'s store located at 10654 Magnolia Blvd.; N.F.M.'s store

located at 15452 Devonshire St.; and THE PLUSH BOUTIQUE a d/b/a/ of Alex Wyszomirski located at 5601 W. Century Blvd., all in the City of Los Angeles.

Signed on this 22 day of June, 1991

RICHARD A. GADBOIS, JR.
RICHARD A. GADBOIS, JR.
United States District Judge

Presented by:

/s/ G R GARROU
G. RANDALL GARROU
Attorney for plaintiffs

PREAMBLE TO LOS ANGELES CITY ORDINANCE NO. 151,294

An ordinance amending Chapter 1, Article 2 of the Los Angeles Municipal Code to add Section 12.70, Adult Entertainment Zoning, in order to regulate adult entertainment businesses, as defined therein, in the City of Los Angeles.

WHEREAS, in recent years there has been a growing concern on the part of public officials and residents of the City of Los Angeles regarding the appearance of a blighting and degrading effect upon certain neighborhoods of the City from the concentration of sex-oriented, adult entertainment businesses in such neighborhoods; and

WHEREAS, based upon said concern, the Los Angeles City Council instructed the City Planning Department on January 12, 1977, to conduct a comprehensive study, with the assistance of the Police Department, City Attorney and other appropriate City agencies, to determine whether and to what extent the concentration of such adult entertainment businesses has a blighting and degrading effect upon the neighborhoods in which they are situated; and

WHEREAS, the findings of the above-mentioned study, which included testimony from public hearings, indicated that the concentration of such adult entertainment businesses tends to result in the blighting and degrading of the areas of such concentration; and

WHEREAS, in order to prevent the further concentration of such adult entertainment businesses and to protect the character of the City's neighborhoods, the City Council enacted a zoning moratorium on August 9, 1977, as an urgency ordinance, temporarily prohibiting the establishment of an adult entertainment business, as

defined therein, within 1,000 feet of another such business or within 500 feet of any church, school, park, playground or area zoned for residential use; and

WHEREAS, in order to allow sufficient time for additional study of this matter and the preparation of a permanent adult entertainment zoning ordinance, the Council directed on November 23, 1977, that said zoning moratorium shall be in effect until August 11, 1978, or until such time as said permanent adult entertainment zoning ordinance has been enacted, whichever first occurs; and

WHEREAS, it is a compelling interest of the City of Los Angeles that a permanent adult entertainment zoning ordinance be enacted in order to preserve the public health, peace, safety and general welfare by regulating adult entertainment businesses in such a manner as to prevent their further concentration and the continued erosion of the character of affected neighborhoods of the City;

NOW THEREFORE:

THE PEOPLE OF THE CITY OF LOS ANGELES

DO ORDAIN AS FOLLOWS:

Section 1. Section 12.70 is hereby added to the Los Angeles Municipal Code, . . .

LOS ANGELES MUNICIPAL CODE

SEC. 12.70. ADULT ENTERTAINMENT ZONING. (Added by Ord. No. 151,294, Eff. 9/1/78.)

A. PURPOSE. It is the purpose and object of this section to establish reasonable and uniform regulations to prevent the continued concentration of adult entertainment businesses, as defined herein, within the City of Los Angeles.

B. DEFINITIONS. For the purpose of this section, certain terms and words are defined as follows:

1. "Adult Arcade" — An establishment where, for any form of consideration, one or more motion picture projectors, slide projectors or similar machines, for viewing by five or fewer persons each, are used to show films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas."

2. "Adult Bookstores" — An establishment which has as a substantial portion of its stock-in-trade and offers for sale for any form of consideration any one or more of the following:

(a) Books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides or other visual representations which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas;" or

(b) Instruments, devices or paraphernalia which are designed for use in connection with "specified sexual activities."

3. "Adult Cabaret" — A nightclub, bar, restaurant or similar establishment which regularly features live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities," or films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas."

4. "Adult Motel" — A motel or similar establishment offering public accommodations for any form of consideration which provides patrons with closed circuit television transmissions, films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas."

5. "Adult Motion Picture Theatre" — An establishment where, for any form of consideration, films, motion pictures, video cassettes, slides or similar reproductions are shown, and in which a substantial portion of the total presentation time is devoted to the showing of material which is characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas."

6. "Adult Theatre" — A theater concert hall, auditorium or similar establishment which, for any form of consideration, regularly features live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities."

7. "Establishment" (Amended by Ord. No. 157,538. Eff. 5/13/83.) — As used in Subsection C

hereof, the "establishment" of an adult entertainment business shall mean and include any of the following:

(a) The opening or commencement of any such business as a new business;

(b) The conversion of an existing business, whether or not an adult entertainment business, to any of the adult entertainment businesses defined herein; *or*

(c) The relocation of any such business.

8. "Massage Parlor" — An establishment where, for any form of consideration, massage, alcohol rub, fomentation, electric or magnetic treatment, or similar treatment or manipulation of the human body is administered, unless such treatment or manipulation is administered by a medical practitioner, chiropractor, acupuncturist, physical therapist or similar professional person licensed by the State of California. This definition does not include an athletic club, health club, school, gymnasium, state licensed cosmetology or barber establishment, reducing salon, spa or similar establishment where massage or similar manipulation of the human body is offered as an incidental or accessory service. (Amended by Ord. No. 155,718, Eff. 8/6/81.)

9. "Public Park" — A park, playground, swimming pool, beach, pier, reservoir, golf course or similar athletic field within the City of Los Angeles which is under the control, operation or management of the City Board of Recreation and Park Commissioners or the County Department of Beaches.

10. "Religious Institution" — A building which is used primarily for religious worship and related religious activities.

11. "School" — An institution of learning for minors, whether public or private which offers instruction in those courses of study required by the California Education Code or which is maintained pursuant to standards set by the State Board of Education. This definition includes a nursery school, kindergarten, elementary school, junior high school, senior high school or any special institution of learning under the jurisdiction of the State Department of Education, but it does not include a vocational or professional institution or an institution of higher education, including a community or junior college, college or university.

12. "Sexual Encounter Establishment" — An establishment, other than a hotel, motel or similar establishment offering public accommodations, which, for any form of consideration, provides a place where two or more persons may congregate, associate or consort in connection with "specified sexual activities" or the exposure of "specified anatomical areas." This definition does not include an establishment where a medical practitioner, psychologist, psychiatrist or similar professional person licensed by the State of California engages in sexual therapy.

13. "Specified Anatomical Areas" — As used herein, "specified anatomical areas" shall mean and include any of the following:

(a) Less than completely and opaquely covered human genitals, pubic region, buttocks, anus or female breasts below a point immediately above the top of the areolas; or

(b) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

14. "Specified Sexual Activities" — As used herein, "specified sexual activities" shall mean and include any of the following:

(a) The fondling or other erotic touching of human genitals, pubic region, buttocks, anus or female breasts;

(b) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation or sodomy;

(c) Masturbation, actual or simulated; or

(d) Excretory functions as part of or in connection with any of the activities set forth in (a) through (c) above.

15. "Substantial Enlargement" — As used in Subsection C hereof, the "substantial enlargement" of an adult entertainment business shall mean the increase in floor area occupied by the business by more than fifty percent (50%), as such floor area exists on the effective date of this section.

16. "Transfer of Ownership or Control" — As used in Subsections C and E hereof, the "transfer of ownership or control" of an adult entertainment business shall mean and include any of the following:

(a) The sale, lease or sublease of such business;

(b) The transfer of securities which constitute a controlling interest in such business, whether by sale, exchange or similar means; or

(c) The establishment of a trust, gift or other similar legal device which transfers the ownership or control of such business, except for transfer by bequest or other operation of law upon the death of the person possessing such ownership or control.

17. "Adult Entertainment Business" — Adult Arcade, Adult Bookstore, Adult Cabaret, Adult

Motel, Adult Motion Picture Theatre, Adult Theatre, Massage Parlor, or Sexual Encounter Establishment, as defined herein, and each shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment. (Added by Ord. No. 157,538, Eff. 5/13/83.)

C. Prohibition. (Amended by Ord. No. 158,579, Eff. 1/23/84.) No person shall cause or permit the establishment, substantial enlargement or transfer of ownership or control of an adult entertainment business within 1,000 feet of another adult entertainment business, or within 500 feet of a religious institution, school, or public park within the City of Los Angeles. No person shall cause or permit the establishment or maintenance of more than one adult entertainment business in the same building structure or portion thereof, or the increase of floor area of any adult entertainment business in any building, structure or portion thereof containing another adult entertainment business.

No person shall cause or permit the establishment, or substantial enlargement, of an adult entertainment business within 500 feet of any lot in an "A" or "R" zone, or within the "CR", "C1", or "C1.5" zones in the City of Los Angeles.

After March 6, 1988, no person shall cause or permit the continued operation, maintenance, or use of a lot, building or structure, or any portion thereof as an Adult Arcade, Adult Bookstore, Adult Cabaret, Adult Motel, Adult Motion Picture Theater, Adult Theater, Massage Parlor or Sexual Encounter Establishment, within 500 feet of any lot in an "A" zone or "R" zone, or within the "CR", "C1", or "C1.5" zones in the City of Los Angeles. (Added by Ord. No. 161,111, Eff. 5/18/86.)

D. MEASUREMENT OF DISTANCE. The distance between any two adult entertainment businesses shall be

measured in a straight line, without regard to intervening structures, from the closest exterior structural wall of each business. The distance between any adult entertainment business and any religious institution, school or public park shall be measured in a straight line, without regard to intervening structures, from the closest exterior structural wall of the adult entertainment business to the closest property line of the religious institution, school or public park.

E. EXCEPTIONS.

1. A person possessing ownership or control of an adult entertainment business which is within 1,000 feet of another such business or within 500 feet of any religious institution, school or public park on the effective date of this ordinance shall be permitted to transfer such ownership or control within two (2) years of said effective date. The person acquiring such ownership or control, however, shall be required to discontinue said adult entertainment business within five (5) years from the date of said transfer of ownership or control, if such business continues to be within 1,000 feet of another such business or within 500 feet of any religious institution, school or public park.

2. A person possessing ownership or control of an adult entertainment business shall be permitted to transfer such ownership or control if such business is not within 500 feet of any religious institution, school or public park and the only other adult entertainment business or businesses within 1,000 feet of such business have been established under a variance from the requirements of this section, pursuant to the variance provisions set forth in Section 12.27 of this Code. This exception shall not, however, apply to an adult entertainment

business which has been established under such a variance.

3. Except for an adult entertainment business required to be discontinued pursuant to Subdivision 1 of this Subsection, if more than one adult entertainment businesses [*sic*] exists in the same building, structure or portion thereof, then all may be continued until March 10, 1985. At that time all shall be discontinued except those established prior to September 1, 1978; but if none of the adult entertainment businesses were established prior to September 1, 1978, then all shall be discontinued except for one, and in case of a dispute the adult entertainment business established first shall have the priority right to continue.

F. SEVERABILITY. If any provision or clause of this section or the application thereof to any person or circumstance is held to be unconstitutional or otherwise invalid by any court of competent jurisdiction, such invalidity shall not affect other section provisions, clauses or applications thereof which can be implemented without the invalid provision, clause or application thereof, and to this end the provisions and clauses of this section are declared to be severable.

LOS ANGELES MUNICIPAL CODE
SEC. 12.22 A 20

20. Adult Entertainment Businesses. (Amended by Ordinance No. 161,111, Eff. 5/18/86.)

(a) Exceptions from Section 12.70-C.

(i) A person may establish and maintain, or continue to operate, an adult entertainment business on a lot within 500 feet of an "A" or "R" Zone, or within the "CR," "C1" or "C1.5" zones, if a site consistent with Section 12.70-C is not reasonably available elsewhere in the City for the establishment or relocation of the subject adult entertainment business. This exception shall only apply to an adult entertainment business which is otherwise in compliance with all other provisions of this chapter including Section 12.70-C.

A site is "reasonably available" elsewhere in the City if it meets all of the following criteria:

(1) its use as the proposed adult entertainment business is consistent with all applicable zoning regulations, including Section 12.70-C.

(2) it is available for use, purchase or rental as an adult entertainment business.

(3) it has adequate street access, street lighting and sidewalks.

(4) it is at least 500 feet away from any uses which are or may become obnoxious or offensive by reason of emission of odor, dust, smoke, noise, gas, fumes, cinders, refuse matter or water-carried waste.

This exception shall not apply to massage parlors or sexual encounter establishments.

(ii) An application for an exception shall be filed in the Office of Zoning Administration upon a form

prescribed for that purpose, identifying the present or proposed location of the subject adult entertainment business, and accompanied by data supporting the proposed exception, and the fee provided for in Section 19.01-N of this Code.

The procedures described in Section 12.24-C,3 shall be followed to the extent applicable. However, a hearing shall be held and decision made within 60 days from the date of filing of an application. This time limit may be extended by mutual written consent of the applicant and Zoning Administrator then having jurisdiction of the matter. An exception shall be approved if it meets the requirements of subparagraph (i) above.

An appeal from the determination of the Zoning Administrator on whether a proposed exception meets the requirements of subparagraph (i), may be taken to the Board and Council in the same manner as prescribed in Section 12.28 for appeals from the Conditional Uses enumerated in Section 12.24-C,1.1. However, a decision on any appeal shall be made within 30 days of the expiration of the appeal period. This time limit may be extended by mutual written consent of the applicant and the Board or Council, whichever then has jurisdiction of the appeal.

If the Zoning Administrator, Board or Council disapproves an exception then it shall make findings of fact showing wherein a site consistent with Section 12.70-C is reasonably available elsewhere in the City for establishment or relocation of the subject adult entertainment business.

(b) Extensions of the Section 12.70-C Amortization Period.

(i) An adult entertainment business existing on March 6, 1986 and operating within 500 feet of a lot in an "A" Zone or "R" Zone or, within the "CR," "C1," or "C1.5" zones may be continued, as specified below:

(1) If the adult entertainment business is otherwise in compliance with all other provisions of this chapter including Section 12.70-C; and

(2) If the adult entertainment business is subject to a written lease, entered into prior to March 6, 1986, with a termination date extending beyond March 6, 1988, then the adult entertainment business may continue until the expiration of the present term of the lease but no later than March 6, 1991; or

(3) If the adult entertainment business involves the investment of money in real property, improvements or stock in trade such that a termination date beyond March 6, 1988 is necessary to prevent undue financial hardship, then it may be continued until March 6, 1991.

(ii) An application for an extension of time shall be filed in the Office of Zoning Administration upon a form prescribed for that purpose, identifying the present location of the subject adult entertainment business, and accompanied by data supporting the exception request, and the fee provided for in Section 19.01-N of this Code. An extension shall be approved if it meets the requirements of subparagraph (i) above.

The procedures described in Section 12.24-C,3 shall be followed to the extent applicable. However, a hearing shall be held and decision made within 60 days from the date of filing. This time limit may be extended by mutual written consent of the applicant and the Zoning Administrator then having jurisdiction of the matter.

An appeal from the determination of the Zoning Administrator on whether a proposed extension meets the requirements of Subparagraph (i), may be taken to the Board and Council in the same manner as prescribed in Section 12.28 for appeals from the Conditional Uses enumerated in Section 12.24-C,1.1. However, a decision

on any appeal shall be made within 30 days of the expiration of the appeal period. This time limit may be extended by mutual written consent of the applicant and the Board or Council, whichever then has jurisdiction over the appeal. If the Zoning Administrator, Board or Council disapproves a proposed extension then it shall make findings of fact showing wherein the proposed extension fails to meet the requirements of Subparagraph (i).

Supreme Court, U.S.
FILED
MAR 21 1994
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No. 93-1013

In The

Supreme Court of the United States

October Term, 1993

CITY OF LOS ANGELES,

Petitioner,

vs.

TOPANGA PRESS, INC.; STUART PARR; BRAND X VIDEO, INC.; E.W.A.P., INC; LIBRARY ONE, INC.; HARDROCK, INC.; BEVERLY BOOKS, INC.; WHITEY, INC.; NEW WAVE, INC.; N.F.M. CORPORATION; PLUSH BOUTIQUE; CAROLINA ENTERPRISES; DASH, INC.; JOTH, INC.; JOAMAR, INC.; JAN RUBINI; 7180 SUNSET BLVD., INC.; A.L.Q. CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Ninth Circuit's affirmance of a preliminary injunction below in direct conflict with *Young v. American Mini Theaters*, 427 U.S. 50 (1976); *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986); and *Barnes v. Glen Theatre, Inc.*, 501 U.S. ___, 115 L.Ed.2d 504 (1991); and, if so, is any such conflict so great as to warrant intervention by this Court at this very interim stage of the case?

2. Did the District Court abuse its discretion by issuing a preliminary injunction against enforcement of certain limited portions of Los Angeles' adult entertainment zoning ordinance under circumstances where the City has conceded that enforcement of those portions of the ordinance would have immediately eliminated from the City of Los Angeles all but one of its existing expressive adult entertainment businesses and, if so, is any such abuse so great as to warrant intervention by this Court at this very interim stage of the case?

3. Should this Court grant review at this interim stage to examine a ripeness issue which was not addressed by the Ninth Circuit in its intermediate ruling below?

4. Should this Court grant review at this interim stage to examine a statute of limitations issue which was not addressed by the Ninth Circuit in its intermediate ruling below?

LIST OF PARTIES

All appellees in the Court of Appeals have been named as respondents in the petition herein and their names are set forth in full on the cover of this document and the petition.

LIST OF PARENT COMPANIES AND SUBSIDIARIES

To the knowledge of undersigned counsel there are no parent companies of the corporations who are respondents herein, nor are there any subsidiary companies other than wholly owned subsidiaries, if any.

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No. 93-1013

In The

Supreme Court of the United States

October Term, 1993

CITY OF LOS ANGELES,

Petitioner,

vs.

TOPANGA PRESS, INC.; STUART PARR; BRAND X VIDEO, INC.; E.W.A.P., INC; LIBRARY ONE, INC.; HARDROCK, INC.; BEVERLY BOOKS, INC.; WHITEY, INC.; NEW WAVE, INC.; N.F.M. CORPORATION; PLUSH BOUTIQUE; CAROLINA ENTERPRISES; DASH, INC.; JOTH, INC.; JOAMAR, INC.; JAN RUBINI; 7180 SUNSET BLVD., INC.; A.L.Q. CORPORATION,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petitioner seeks review of the Ninth Circuit Court of Appeals' affirmance of a preliminary injunction issued to preserve the status quo pending a trial to determine whether Los Angeles' adult zoning ordinance challenged in this case is constitutional. As yet, there has

been *no* substantive determination of that ultimate question of constitutional law. While much evidence was offered by both sides in connection with the preliminary injunction motion, most of the dispositive facts in this case remain to be adjudicated.

The City of Los Angeles (hereinafter alternatively "City" or "petitioner") suggests that there is sufficient need to warrant immediate review by this Court at this very early stage of the case because the ordinance is assertedly "consistent with the clear authority of *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) . . . and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)." Whether this ordinance is ultimately found to be authorized (or condemned) by *Young* or *Renton* is a determination that surely would best await a trial on the merits after all relevant facts can be determined by the trial court.

OPINIONS AND ORDERS BELOW

Respondents adopt the presentation of these matters as set forth in the petition.

JURISDICTION

Respondents adopt the statement of jurisdiction in the Petition, except to the extent that the Petition indicates 28 U.S.C. § 2103 as the statutory basis for this Court's jurisdiction. That section was repealed in 1988. Nonetheless, respondents concede that this Court has

proper jurisdiction under the provisions of 28 U.S.C. § 1254 (1).

By order of Justice Sandra Day O'Connor, pursuant to Rule 15.2 of this Court, the date for filing of this Brief in Opposition to Petition for Writ of Certiorari was extended to Monday, March 21, 1994.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondents adopt the presentation of these matters as set forth in the petition.

STATEMENT OF THE CASE

A. History And Background Underlying The City's Ordinance.

Respondents adopt petitioner's brief description of the various ordinances involved in this case. However, respondents wish to supplement petitioner's statement by providing some of the salient facts regarding the history and background for these ordinances which do not appear in the petition.

Contrary to the conclusion assertedly reached by the Los Angeles City Council (quoted in the Petition at p. 5) in its self-serving statement of purpose in support of the City's original 1978 adult entertainment zoning ordinance (an ordinance not challenged herein), the original study conducted by the City to investigate the effect of a concentration of adult entertainment businesses in various

parts of Los Angeles did *not* produce any objective evidence of blight or depressed property values attributable to the presence of adult entertainment businesses. Neither did it present any clear pattern of evidence demonstrating an increased likelihood of crime in the neighborhoods where such businesses were located, as compared to similar neighborhoods where such businesses were absent. Nonetheless, after the City's enactment of its original 1978 adult zoning ordinance (which applied only *prospectively* and which prohibited independent adult businesses from being established within 1,000 feet of each other or within 500 feet of any church, school, or park), the adult entertainment industry in Los Angeles accepted that ordinance as a reasonable compromise between those who wanted to limit continued proliferation of such businesses and the need to provide a sufficiently reasonable number of viable locations for such businesses that the public's access to this type of constitutionally protected material would not be significantly impaired.

The Petition also describes a "1985 Study . . . which produced additional evidence of the degrading effects of adult businesses on nearby areas." The study in question, itself, however, cautioned that "this was not a scientifically conducted survey, but rather a public observation and opinion poll . . . ."[1]

The Petition's discussion of the legislative history also omits mention of the fact that, in May of 1978, a few

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[1] This statement appears at p. 6 of the City Planning Director's report of June 6, 1985, and appears as Exhibit 10 in the Excerpts Of Record filed by the City in the Court of Appeals.

months before enactment of the city's initial adult zoning ordinance, City Planning Department officials conducted careful studies to determine what effect a 500 foot residential proximity prohibition would have on the number of adult businesses in Los Angeles, as well as whether the City had a valid need for such a provision. The City's own Study concluded:

> *"Such a prohibition was considered to be overly restrictive in light of the preponderance of highway oriented commercial zoning in the City, typically with shallow frontage and typically adjoining residentially zoned property.* Further, after discussions with the Planning and Environment Committee, it was determined that *the concentration of adult entertainment businesses can be prevented adequately by the imposition of the aforementioned 1,000 feet [from other adult businesses] and 500 feet [from churches, schools and parks] separation criteria contained in the final ordinance."* (Emphasis added.) CDT[2] 137:47, and *see* CDT 137:40-41.

Thereafter, in 1982, when the Council was again considering further restrictions on the location for adult entertainment businesses, Claudia McGee Henry, Assistant City Attorney and opposing counsel herein, sent a very revealing and confidential letter to certain City Council members. In this letter, the City Attorney's office quietly informed the Council that enactment of the 500 foot residential proximity restriction here challenged

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[2] The reference "CDT" is to the clerk's docket entries in *Topanga Press, Inc. v. City of Los Angeles*, C.D. Cal. No. CV 88-7838 RG, the lead case of seven cases consolidated below. "CDT 137:47" indicates that the reference is to page 47 of the document filed as entry 137 in the clerk's docket.

"would result in the closure of almost every existing adult entertainment business in the city" and that, "[b]ased on this fact, *there is a substantial likelihood that a court would conclude that the proposal has more than an incidental effect on First Amendment protected activities."* CDT 137:9-10. (Emphasis added.)

Nonetheless, shortly after this Court's decision in *Renton*, the City apparently concluded that this Court had removed all constitutional barriers to the enactment of such legislation, no matter how devastating its effect. This Court's *Renton* decision was handed down on February 25, 1986. On April 11, 1986, less than two months after the opinion in *Renton*, the City Council enacted its amendment forcing the closure of all existing lawful conforming adult entertainment businesses operating within 500 feet of a residential zone.[3] It was "Approved as to Form and Legality" by the same Assistant City Attorney who had cautioned, four years earlier, that its enactment "would result in the closure of almost every existing adult entertainment business in the city."

In support of their motions for preliminary injunction, respondents submitted uncontroverted evidence

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[3] As a result of obvious zeal following this Court's decision in *Renton*, the City's 1986 amendment *additionally* prohibited adult entertainment businesses from operating within 500 feet of any *agricultural* zone. Of course, this merely compounded the restrictive impact of the ordinance even beyond the devastating impact caused by the residential proximity restriction. The amendment also, for the first time, additionally banned otherwise lawful adult entertainment businesses from operating within many of the City's otherwise permissible *commercial* districts!

showing that the number of adult entertainment businesses in Los Angeles had been reduced from well over 200 to significantly less than half of that number since the City first adopted its original adult zoning ordinance in 1978.[4]

Respondents also presented substantial evidence to prove the truth of the City Attorney's 1982 prediction as to the devastating effect which the 500 foot residential proximity restriction would have on existing adult businesses. The evidence obtained through discovery indicated that if the adult zoning ordinance were allowed to take complete effect, all but one of the existing adult entertainment businesses in the City of Los Angeles would be forced to close.

Respondents also presented voluminous studies and evidence to demonstrate that, by addition of the residential proximity restrictions of the ordinance, the overall zoning scheme will also effectively deny a reasonable opportunity for any *new* adult entertainment businesses to find a viable site. At this preliminary stage of the case, the evidence concerning the effect on *new* adult entertainment businesses is very much in dispute (suggesting

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[4] In its 1973 opinion in *Kaplan v. California*, 413 U.S. 115, 116 (1973), this Court found that there were "approximately 250 'adult' bookstores in the City of Los Angeles, California." This Court's opinion did not indicate how many *other* adult businesses were then in the City of Los Angeles but, presumably, the total number of such businesses was far greater than 250. In response to discovery below, the City of Los Angeles has identified only 102 different adult entertainment businesses that are either currently in existence in the City of Los Angeles or that existed there as of 1988. CDT 138:3-4 and 138:26, fn 12.

again that it would be unwise to grant review at this preliminary stage of the case). In any event, the evidence presented by respondents in support of the preliminary injunction concerning the effect of the ordinance on *new* adult entertainment businesses (or on old ones which would be forced to attempt to find relocation sites) was as follows:

1. Initially, respondents hired a professional cartographer and geographer, Michael Taugher, for the purpose of determining the location of those sites within the City that would be "legally permissible" (even if totally unusable) for an adult entertainment business. To accomplish this task, Mr. Taugher was given a copy of all relevant zoning provisions from the City Code and he then obtained comprehensive zoning maps for the entire City of Los Angeles. Next, he conducted extensive field studies of all locations within the City which were in proper zoning classifications (*e.g.*, which were in the proper commercial or manufacturing zones) and which were not within 500 feet of residential or agricultural property. It was then necessary for him to determine the location of all distance-triggering "sensitive" uses (including churches, schools and parks) in order to additionally carve out a 500 foot radius around all such locations (as such areas would be impermissible for any new adult entertainment business). Mr. Taugher then presented computer drawn maps demonstrating that only 6.54% of the total acreage of the City was "definitionally permissible" for use by an adult entertainment business, *i.e.*, only 6.54% of the City's overall area would be legal (vis-a-vis the City's zoning laws) if used by an adult entertainment business. However, *less than 0.18% of the*

City's commercially zoned land is located in those "definitionally permissible" areas. CDT 100:7.

2. Using *extremely* conservative criteria, Mr. Taugher next subtracted from the 6.54% that acreage which was, to even the most casual observer, most obviously unusable for *any* commercial retail business. This eliminated areas such as many thousands of acres of land under water in the Los Angeles Harbor and the runways at Los Angeles International Airport. (CDT 100:6 and CDT 132:8-10.) *The remaining percentage of "legally permissible" land was 2.46%,* almost none of which was in commercially zoned land and almost all of which was deeply buried in the back of highly unsuitable manufacturing areas. (CDT 100:8.)

3. Respondents then hired a second expert, Mr. Bruce Bailey, a commercial real estate specialist with a prominent San Fernando Valley commercial real estate firm. (CDT 131:1-3.) Mr. Bailey personally accompanied Mr. Taugher to each and every one of the sites which Taugher had identified as "legally" or "definitionally" permissible. (CDT 131:3.) Bailey's job was to apply the standard criteria that he would use in finding a feasible commercial site for any other commercial retail client and to then determine how many commercially feasible sites existed within Taugher's 6.54% of the City for use by the various types of adult entertainment businesses regulated by the ordinance. CDT 131:3, ¶ 4 and 6.

4. In performing his analysis, Mr. Bailey did *not* exclude any property simply because it was undeveloped

or not currently for rent or sale. CDT 131:3, ¶ 5. Instead, he looked at all the property in the "definitionally permissible" areas identified by Taugher and attempted to determine the number of sites which would be at all viable for an adult entertainment business *assuming, arguendo, it were able to acquire the property*. In making those determinations, Bailey did not eliminate a location as "unfeasible" or "non-viable" unless he concluded that *no* adult bookstore, theater or cabaret could conceivably conduct a viable business at the location. Moreover, he provided a detailed list of the criteria he was applying in making these eliminations. CDT 131:3-7.

5. After personally inspecting many thousands of locations and all the locations indicated by Taugher, Bailey concluded:

> a) He could not find even one "potentially viable," lawful location for an adult motion picture theater (CDT 131:8);
>
> b) There were, at most, 20 "potentially viable," lawful locations for adult cabarets (*id.*);
>
> c) There were no more than 100 "potentially viable," lawful locations for adult bookstores (*id.*).

He made no finding that any of these "potentially viable" sites were in fact available. CDT 131:8.

6. Bailey also declared that these very few "potentially viable" locations would require further and more detailed analysis to determine if in fact they were truly

usable or suitable for a new adult business. This would require closer examination of a variety of location-specific details. CDT 131:8. Additionally, he determined that these very few "potentially viable" sites were not clustered in the same area, thereby making the prospect of a client actually acquiring one of those sites far more remote.[5] CDT 131:8-9.

7. Mr. Bailey also concluded that, based upon his experience, the existence of only 100 "potentially viable" locations for adult bookstores that are scattered throughout the entire City would make it exceedingly difficult to find even *one* location that such a bookstore could actually acquire. He explained that, based on his experience, a commercial business ordinarily requires a very large base of potential locations in order to actually succeed in securing one. Specifically, he stated that he typically needs about 150 possible *viable* locations in order to find one actual, *available* location[6] for a retail client for whom he is attempting to find a relocation site. CDT 131:8-9.

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[5] As explained in Mr. Bailey's Declaration, a client is much more likely to be able to find a property available if there are numerous other similarly suitable properties in the same general area. Where, as here, the potentially suitable properties are widely scattered, it is highly unlikely, from a commercial real estate perspective, that any of them will actually be able to be acquired. CDT 131:8-9.

[6] Again, however, Mr. Bailey's conclusions as to the limited number of *viable* locations for these businesses was not premised in any way on any requirement that they be actually *available*. *Renton* clearly prohibits actual current availability to form part of the relevant calculus in determining the number of feasible sites.

8. As an example, Bailey testified that he was previously hired by the Blockbuster Video chain to find a location for them within the Westchester district of Los Angeles. In doing so, he had initially identified 100 locations within Westchester that would be viable locations for locating one of their stores. However, after three months of diligent attempts, he was unable to find even one location that his client could actually acquire. He testified that it would certainly be no easier for one intending to operate an adult entertainment business to acquire such property. CDT 131:9.

9. Bailey also predicted that the combined ordinances would effectively prevent adult businesses from acquiring *any* viable locations within the entire San Fernando Valley (a somewhat geographically isolated portion of the City of Los Angeles populated by well over a million people). CDT 131:9-10.

10. Finally, superimposed upon all these limitations is the significant limitation that none of the acreage figures given in Taugher's study (i.e., neither the "definitionally permissible" areas, nor the areas which remain after subtracting from the "definitionally permissible" areas, the most obviously unusable areas) in fact constitute land that would be even potentially available for more than one adult entertainment business. This is because once one adult entertainment business occupies one of these locations, the ordinance's ban on any other adult business within 1,000 feet precludes any *other* adult entertainment business from locating within a contiguous

72-acre circle around that first such business.[7] The more businesses there are that find locations, the diminishment of available areas for the next business becomes exponential. CDT 132:11-12

In sum, respondents presented voluminous evidence below demonstrating the devastating effect which the challenged ordinance would have not only on *existing* adult entertainment businesses, but also on any new such businesses that might attempt to open in the City. In contrast, the City vigorously disputes the significance of the evidence presented by respondents. Because this case is only at the preliminary injunction stage, the trial court, of course, has made no findings of fact with respect to *any* of this evidence.

B. Proceedings Below

For the most part, respondents adopt the description of the proceedings below presented by the City. However, respondents reject the City's characterization of two of their three motions for preliminary injunction. The second of respondents' three preliminary injunction motions sought to prevent enforcement of the 1983 amendment to the ordinance which the City had construed and interpreted as prohibiting, *inter alia*, multiple adult *uses* within a single adult entertainment business.[8]

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[7] *See, Walnut Properties v. Whittier*, 861 F.2d 1102, 1108, fn.4 (9th Cir. 1988).

[8] The ordinance defines every adult entertainment use as constituting a distinct adult entertainment "business" and then demands that all such "businesses" be in separate buildings.

The third preliminary injunction motion filed by plaintiffs was not directed against the entire adult zoning ordinance, but only against the portions challenged in the first two preliminary injunction motions, *i.e.*, the 1986 residential proximity restriction and the 1983 amendment which has been construed by the City to effectively prohibit multiple adult entertainment uses within a single business. The third preliminary injunction motion challenges those two limited portions of the ordinance on the ground that the ordinance's definitional provisions are impermissibly vague.[9]

REASONS FOR DENYING THE WRIT

The reasons for denying certiorari at the present stage of this case are numerous, and include the following:

Through use of the euphemism of describing each adult entertainment activity within a single business as a separate adult entertainment "business", the city has imposed on the ordinance a construction which respondents challenge both as a matter of statutory construction and, as so construed, as being in direct violation of the First Amendment. There were also a variety of distinct challenges to this provision based upon the construction of certain grandfather provisions in the ordinance. The grandfather provisions did not apply equally to all similarly situated plaintiffs.

[9] Different vagueness challenges were raised by a variety of plaintiffs who, by declaration, each presented a distinct factual basis for showing that the ordinance was vague in its application to *them*. As the Ninth Circuit's opinion did not address the vagueness challenge for purposes of its interim ruling, there would seem to be little point to interim review by this Court on that issue.

A. Review Is Premature At This Preliminary Stage Of The Case.

As explained above, neither the District Court nor the Court of Appeals made any finding concerning the constitutionality of this ordinance, nor did either court make any findings of fact. The District Court merely noted that the equities strongly favored preservation of the status quo pending trial and that respondents had at least presented sufficiently significant factual issues to merit preservation of the status quo until they could be resolved at trial.

While this Court, of course, has *jurisdiction* to accept review of even the most interim of rulings from the lower federal court system, it has traditionally followed a well established pattern of exercising prudential restraint in reviewing cases prior to a final judgment below. *See, e.g.*, Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*, 7th Ed. 1993, pp. 195-198, and cases there cited.

An additional reason counseling restraint based upon the interim nature of this case is the fact that there are a number of very significant constitutional questions raised herein which have not, as of yet, even been *addressed* by the courts below in these proceedings. For example, both courts below found it unnecessary to address respondents' numerous and distinct claims of vagueness in light of the fact that preservation of the status quo seemed warranted simply based upon the potential overall restrictive effect of the ordinance and the voluminous evidence offered in support of that point. At a trial, all of the distinct constitutional and statutory bases of challenge would likely be addressed, providing this Court

with a full opportunity for a complete review of the entire action in one proceeding, upon any subsequent appeal from a final judgment herein.

B. There Is No Conflict Between The Opinion Of The Court Of Appeals And The Prior Decisions Of This Court.

City of Renton v. Playtime Theatres, Inc., supra, represents this Court's decision most favorable to the City when analyzing the constitutionality of adult entertainment zoning laws. However, even under the standards articulated in that case, this Court made it clear that "the First Amendment requires . . . that [a city] refrain from *effectively* denying respondents a *reasonable* opportunity to open and operate an adult [business] within the City . . . . " 475 U.S. at 54. Emphasis added.

At this interim stage of the case, there is a very significant factual dispute as to whether the City of Los Angeles has *effectively* denied respondents a *reasonable* opportunity to operate adult businesses within the City. While the opinion of the Court of Appeals examines this question from a number of perspectives, it does not disagree with the underlying notion that, on remand, the *Renton* test, as articulated above, must provide the ultimate guidance for the trial court. Accordingly, it would be a waste of judicial resources for this Court to review the preliminary discussion of these matters by the Court of Appeals prior to reviewing a final judgment where the District Court has made a factual determination whether the City has *effectively* denied respondents a *reasonable*

opportunity to operate their adult entertainment businesses.

C. The Equities Overwhelmingly Support Preservation Of The Status Quo Pending Trial.

In the underlying lawsuit, respondents do not challenge in any way the backbone of the City's adult zoning ordinance, *i.e.*, the original 1978 provisions which prohibit independent adult entertainment businesses from operating within 1,000 feet of each other and which prohibit them from operating within 500 feet of any church, school, or park. The City remains fully free to enforce those provisions against anyone in the city.

Neither does the preliminary injunction prevent the City from enforcing against any *new* businesses its amendments prohibiting residential proximity. The *sole* impact of the existing interim injunction is to simply preserve the status quo *only as to these litigants* pending a full trial on the merits.

The only "urgency" supporting the City's claimed need for immediate review by this Court is the fact that the preliminary injunction has prevented the City from immediately forcing the closure of all of the relatively few adult entertainment businesses in this lawsuit. All but one of these once lawfully conforming businesses became nonconforming uses by virtue of the 1986 amendment which required the termination of all preexisting and lawful adult entertainment businesses located within 500 feet of residentially zoned property.

Certainly, under these circumstances, it cannot be said that the two courts below abused their discretion by simply preserving the status quo and preventing irreparable injury pending a final determination of the ultimate constitutional questions at trial. *A fortiori*, there appears to be very little reason why this Court should intervene in this case, particularly since there has been no final determination of the constitutionality of the ordinance.

D. Contrary To The Suggestion In The Petition, The Court Of Appeals' Opinion Does Not Conflict With This Court's Decision In Barnes.

There is absolutely no basis for any potential conflict between the Court of Appeals' opinion herein and this Court's decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. ___, 111 S.Ct. 2456 (1991). Justice Scalia's concurrence in *Barnes* provided the necessary fifth vote for a judgment upholding the Indiana anti-nudity law in that case. The articulated basis for Justice Scalia's upholding of that law was that it was not subject to First Amendment scrutiny because it was a law of general application which did not single out or otherwise disproportionately impose its impact on those engaged in First Amendment activities. However, in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), this Court ruled that First Amendment considerations *do* apply where, as here, a law singles out "adult entertainment businesses" for its restrictions, many, but not all, of which are businesses distinguished by their

engagement in presumptively protected First Amendment activity[10]. Accordingly, since the adult zoning ordinance in this case, unlike the public anti-nudity statute in *Barnes*, singles out the same small category of businesses singled out in *FW/PBS* (many, but not all, of which are businesses engaged in sexually oriented *expression*), the Ninth Circuit's application of the First Amendment principles of *Renton* and *Young* is clearly not in conflict with the opinions of a majority of this Court as expressed in *Barnes*.

Moreover, the strictures of Los Angeles' adult zoning ordinance are not triggered as to exotic dancing activities only when the performers remove G-strings or pasties.[11] *Any* exposure of *any* portion of the female breast below the top of the areola, or of *any* portion of the buttocks,

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[10] "The businesses regulated by [Dallas'] licensing scheme include adult arcades . . . , adult bookstores or adult video stores, adult cabarets, adult motels, adult motion picture theaters, adult theaters, escort agencies, nude model studios, and sexual encounter centers . . . . Although the ordinance applies to some businesses that apparently are not protected by the First Amendment, *e.g.*, escort agencies and sexual encounter centers, it largely targets businesses purveying sexually explicit speech which the City concedes for purposes of these cases are protected by the First Amendment." 493 U.S. at 224.

" * * * We, therefore, hold, as a threshold matter, that petitioners may raise a facial challenge to the licensing scheme, and that as the suit comes to us, the businesses challenging the scheme have a valid First Amendment interest." 493 U.S. at 225.

[11] Chief Justice Rehnquist's plurality opinion in *Barnes* made clear that First Amendment principles *do* apply to exotic dancing performances where the performers at least retain the minimal coverings of "G-strings" and "pasties." ___ U.S. at ___, 111 S.Ct. at 2463.

will trigger operation of the Los Angeles ordinance. Accordingly, since the ordinance's definitions of "adult theaters" and "adult cabarets" have not been limited to "*Barnes* proportions," the Court of Appeals' utilization of First Amendment doctrines derived from *Young* and *Renton* cannot *possibly* be in conflict with this Court's opinion in *Barnes*.

Finally, the dancing performances at those of plaintiffs' businesses which are either "adult theaters" or "adult cabarets," as defined in the ordinance, do not involve the exclusive exhibition of totally nude dancing performances. All of these businesses feature performances where a dancer will begin her dance with all private parts of her anatomy fully covered. As the dance progresses, portions of the anatomy are revealed which bring the establishment under the broad definitions for "adult cabaret" or "adult theater" in the ordinance, but which still do not involve total or even partial nudity.[12] As a result, as a simply factual matter, the ordinance prohibits conduct at respondents' establishments which even the most expansive reading of *Barnes* would find to be fully protected by the First Amendment.[13] Accordingly, there is no conceivable basis for granting certiorari herein based upon any perceived conflict with *Barnes*.

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[12] Thereafter, fully or partially nude dancing occurs.

[13] The record developed in support of the preliminary injunction (which was issued before *Barnes* was decided) does not provide the detailed description set out above concerning the dance performances exhibited in plaintiffs' establishments. These, however, are the facts and they will be fully developed at trial, given their new post-*Barnes* relevance.

E. The Interlocutory Ruling Herein Would Be A Particularly Poor Vehicle For Addressing Any Perceived Conflicts Among The Lower State And Federal Courts Involving Adult Zoning Legislation.

The City also asserts that the opinion below is in conflict with adult zoning decisions of other federal courts of appeals and of the California Supreme Court. A key factor, however, is that each of these opinions identified by the City represents a final judgment applying principles of constitutional law to settled facts. The present ruling by the Court of Appeals merely preserving the status quo pending trial would be a particularly poor vehicle for addressing any perceived conflicts among the lower state and federal courts involving adult zoning legislation. There has simply been no factual determination yet of the most dispositive facts in this case, *i.e.*, whether the ordinances here challenged "*effectively* deny[] respondents a *reasonable* opportunity to open and operate [their] adult [businesses] within the city . . . . " *Renton, supra*, 475 U.S. at 54. Until these facts are determined at trial, the present case will remain a particularly poor vehicle for resolving any perceived conflict among the *other* federal circuits (assuming *arguendo*, that any exists).

F. The City's Assertion That Certiorari Should Be Granted To Analyze A "Statute Of Limitations" Issue Is Utterly Without Merit.

The City's fourth question presented requests certiorari review of the question of whether the present dispute is barred by the statute of limitations. This issue, which petitioner raised in the Court of Appeals *only in its*

Petition for Rehearing, was not, of course, addressed by the Court of Appeals in its opinion. If there is any ultimate error in this regard, this Court can certainly correct it following review from a final judgment. However, since the Court of Appeals did not even *address* this issue, its opinion can hardly create a conflict worthy of certiorari review by this Court at this time.

Simply for the record, respondents' position is that the City's statute of limitations argument is frivolous because the statute of limitations' principles relied upon by the City are derived exclusively from cases where *damages* were sought; those principles are neither supported by, nor applicable to, cases such as the present ones where exclusively *equitable* relief is sought. This Court has repeatedly admonished plaintiffs seeking prospective injunctive relief to withhold raising facial challenges to allegedly unconstitutional laws until they can demonstrate a sufficient personal stake in the outcome to merit resolution by the courts. Moreover, federal injunctive relief is typically issued only when there is no alternative way that a plaintiff can resolve a problem. However, in the present case, there were numerous reasons why the various consolidated plaintiffs below brought the seven originally separate lawsuits at the various points in time when they did. Without going into detail as to each case and each reason for the timing of its filing, suffice it to say that the plaintiffs assiduously followed this Court's equitable teachings in withholding the seeking of relief until they were assured of proper standing and they had no reasonable alternative but through litigation.

A second reason why the City's statute of limitations argument is frivolous is that when governments pass

facially unconstitutional laws which interfere with fundamental constitutional rights, each day that such laws remain in effect they unlawfully and prospectively restrain new constitutionally protected activities. As to each such restraint, any statute of limitations period would necessarily commence anew.

Obviously, as a matter of federal equitable policy, this Court has frequently *expanded*, rather than restricted, the rights of litigants to bring facial challenges to substantially overbroad laws which stifle protected expression in a significant number of their applications. *Compare, e.g., Broadrick v. Oklahoma*, 413 U.S. 601 (1973); and *Bigelow v. Virginia*, 421 U.S. 809 (1975). As a matter of constitutional policy, it would make little sense to adopt a doctrine forcing one to forever suffer the consequences of living under a facially unconstitutional law stifling future expression, simply because they waited to challenge it until it was certain to adversely affect them. So long as an unconstitutionally overbroad law continues to exert new factual injury to one wishing to exercise rights of free speech prohibited by that law, if there were such a thing as a statute of limitations for injunctive relief in these circumstances, such limitations period must necessarily recommence with each new day that the challenged law assertedly stifles (or threatens to stifle) protected expression.[14]

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[14] Suppose, for example, an overbroad law were enacted preventing the sale or possession of materials which advocate joining one particularly poor obscure religious cult. It could easily be the case that no one immediately affected by the ordinance has sufficient resources to bring an immediate federal declaratory lawsuit challenging it. However, if no lawsuit is

Finally, the policy considerations which cause the imposition of statutes of limitations in damages cases are not present in equitable cases where the constitutionality of laws are at issue. In damages cases, statutes of limitations prevent potentially unending liability exposure for a potential defendant. A primary reason for these limitations periods is that a defendant in a damages cause of action has an increasingly difficult time presenting a defense the longer the period of time between the original injury and notice of the filing of a lawsuit. Witnesses will frequently be lost and memories will fade the greater the period of time following the original injury. No comparable policy consideration supports a governmental agency's right to perpetually rely upon facially unconstitutional statutes. A governmental defendant can just as easily defend a facial constitutional challenge filed twenty years after a statute is enacted as one filed two days after its enactment. The controlling factor is almost always the status of current caselaw, not memories of ancient facts.

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brought challenging the law in the first year after it is enacted, should the city or other governmental entity then be free to keep this facially unconstitutional law on the books permanently? The obvious answer is no. No policy considerations of repose or conservation of judicial resources can possibly justify imposing loss of fundamental liberties as the price for exercising restraint in the filing of federal actions for declaratory and injunctive relief. If a law continues to impose current constitutional harm, it should be challengeable by anyone directly affected thereby, so long as it continues to exert such unconstitutional effect. *C.f.*, *Wooley v. Maynard*, 430 U.S. 705 (1977).

Accordingly, even if this Court were to recognize the existence of statutes of limitations in equitable cases generally, there would have to be an exception to such doctrine where the equitable relief sought was to be free from unconstitutional actions, policies or laws enacted or pursued by governmental agencies.

G. The City's Assertion That Certiorari Should Be Granted To Analyze The "Ripeness" Of The Present Case, Is Also Utterly Without Merit.

The City's third question presented requests certiorari review of whether the present dispute was "ripe" for adjudication. It does not assert that the Court of Appeals opinion is in conflict with the opinion of any other court on this point (nor could it since the Court of Appeal did not even *address* this issue in its interim opinion below). Moreover, the point is clearly untimely as the City never even *asserted* a claim involving ripeness in the Court of Appeals.

In any event, the City's assertion of a lack of "ripeness" is clearly frivolous. Essentially, the City has argued that, simply because respondents' businesses have not yet been forced to close, their claims are somehow not ripe for adjudication. However, but for the issuance of the trial court's preliminary injunction, the ordinance would clearly have compelled the closure of *all* of the plaintiffs' businesses. The entire purpose of the interim injunctive relief was to prevent that injury from occurring until the court could determine the constitutionality of the ordinances at trial.

The City then seems to suggest that there is an additional exhaustion of administrative remedies requirement

which would compel respondents to seek an administrative exception to the ordinance before they would be entitled to claim that their challenge to the ordinance is ripe. However, the only cases they cite for this proposition are cases arising under the "taking" clause of the Fifth Amendment.[15] They neither mention the fact that this Court has repeatedly stated that there is no exhaustion of administrative remedies requirement in actions under 42 U.S.C. § 1983,[16] nor point out that even in the *taking clause* case they rely upon, *Williamson County, supra,* this Court expressly clarified that it was not in any way limiting *Patsy's* clear holding that there is no exhaustion of administrative remedies requirement in 1983 cases. Rather, *Williamson County* clarified that the ripeness issue there recognized is unique to taking clause claims because until one has sought compensation for an allegedly unconstitutional taking, a court cannot determine whether the taking has been *without just compensation.* This narrow exception has no application in the typical civil rights lawsuit not involving a taking clause claim. Any other conclusion would require the outright reversal of both *Patsy* and *Felder,* as well as a long line of additional cases upon which those opinions relied.

Obviously here, each plaintiff has alleged a fully ripe claim because nothing more need necessarily occur in

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[15] *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172 (1985); and *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340 (1986).

[16] *See, e.g., Patsy v. Board of Regents,* 457 U.S. 496 (1982); and *Felder v. Casey,* 487 U.S. 131 (1988).

order for the plaintiffs to suffer constitutionally cognizable injury under the ordinance.

CONCLUSION

For all the reasons set forth herein, there is no sound jurisprudential reason for this Court to grant certiorari review of the interlocutory opinion below. If this Court truly believes the issues herein may merit ultimate review by this Court, surely the better time to perform that review would be after the trial court has resolved the critical factual issues herein, not the least of which is whether the ordinances here challenged "*effectively* deny[] respondents a *reasonable* opportunity to open and operate [their] adult [businesses] within the city . . . . " *Renton, supra*, 475 U.S. at 54. (Emphasis added.)

DATED: March 21, 1994

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 21 1994
OFFICE OF THE CLERK

(3)

No. 93-1013

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

CITY OF LOS ANGELES,
Petitioner,

v.

TOPANGA PRESS, INC., et al.
Respondents,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE NATIONAL FAMILY LEGAL FOUNDATION, FOCUS ON THE FAMILY AND FAMILY RESEARCH COUNCIL IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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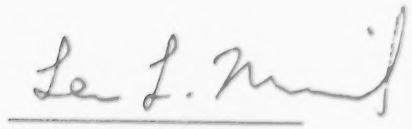
MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

National Family Legal Foundation, et al. respectfully move for leave to file the attached brief *amici curiae*. Counsel for Petitioners and Respondents have consented to our filing this brief. (See Appendix A).

Respectfully submitted,



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INTEREST OF THE AMICI CURIAE

National Family Legal Foundation is a nonprofit, public interest corporation that seeks to preserve the integrity of families and the innocence of children by promoting a healthy and safe environment, free from illegal pornography and the sexual crimes which invariably accompany its widespread availability. NFLF provides legal assistance to individuals, organizations, prosecutors and other public officials concerned about the harmful impact of pornography on the quality of life.

NFLF's first Executive Director, Alan E. Sears, was the Executive Director of the Attorney General's Commission on Pornography. Former Attorney General Edwin Meese III, who presented the 1986 Commission Report, continues to support enforcing constitutional laws restricting various forms of pornography by serving as an active member of the Board of Directors for NFLF. In

its 1986 Final Report, the Commission discussed the harm caused to communities by businesses that purvey sexually explicit materials or services. These harmful secondary effects include increased crime and the aesthetically displeasing appearance of such businesses which leads to neighborhood blighting. The Commission recognized that zoning ordinances regulating these businesses and their secondary effects are one method of minimizing these harms. Final Report of the Attorney General's Commission on Pornography at 60-61 (1986). NFLF has assisted hundreds of cities in drafting and defending ordinances that impose time, place and manner regulations on sexually oriented businesses.

Focus on the Family is a Christian, non-profit organization committed to strengthening the emotional, psychological and spiritual health of children and their families in the United States and throughout the world.

Focus President Dr. James C. Dobson, a renowned child psychologist, served on the Attorney General's Commission on Pornography in 1986.

Focus on the Family has produced two major videos, "A Winnable War" and "Fatal Addiction" and assisted in one book Pornography: A Human Tragedy which directly discusses the harms of pornography to children, men, women and families in America. The videos and book have been seen and read by thousands of concerned citizens nationwide. Amici's daily radio broadcasts dealing with family concerns and interests are heard by more than one million people daily over 1400 stations. Its monthly magazine has a circulation of 1.85 million.

Focus on the Family works to preserve and protect the family, and thus has particular concern and experience regarding the impact of sex businesses on

family-oriented neighborhoods.

Family Research Council, Inc. is a voice for the pro-family movement in Washington, D.C. and provides policy analysis, legislative assistance and research for pro-family organizations. It also seeks to educate legislators on issues which affect American families. Its research, publications and films on the impact of pornography and sexually oriented businesses have been distributed to over 400,000 scholars, organizations and citizens.

The issues in this case directly affect the physical, psychological and emotional well being of children, parents and communities throughout the United States. Family Research Council, Inc. works through legislative assistance and public policy to preserve and protect the family and thus has particular knowledge about the harmful secondary impact of sex businesses on families

and neighborhoods.

Amici are concerned about the Ninth Circuit's decision allowing economic considerations to affect the determination of whether a particular zoning ordinance has made sufficient land available for sexually oriented businesses. The decision both contradicts the Supreme Court's decision in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), and severely restricts the ability of cities to preserve the family-friendly quality of life desired by their citizens. The Ninth Circuit judged the Los Angeles ordinance by a standard that is not constitutionally required and that was explicitly rejected by the *Renton* Court. The decision should be reversed so that cities may pursue their zoning and redevelopment plans as their citizens desire without fear of unwarranted legal challenges from sexually oriented businesses.

INTRODUCTION

The Ninth Circuit in *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993), upheld a preliminary injunction against the City's enforcement of Municipal Code § 1270, which regulates the location of sexually oriented businesses in Los Angeles. In doing so, the Ninth Circuit held that the ordinance presented serious questions of law with respect to the availability of alternative avenues of communication and that the district court did not abuse its discretion in finding that the balance of hardships tipped sharply in favor of the sexually oriented businesses requesting relief. *Topanga Press*, 989 F.2d at 1534. Specifically, the court held that economic viability of sex businesses locating in certain spots could be considered when determining whether that land is in the relevant real estate market and therefore whether it is truly available. *Topanga Press*, 989 F.2d

at 1530.

The Ninth Circuit is in direct conflict with this Court's decision in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 54 (1986), which explicitly disallowed consideration of economic factors in the determination of whether land was available to sexually oriented businesses. It also conflicts with the California Supreme Court's decision in *City of National City v. Wiener*, 3 Cal.4th 832, 842-43 (1992), ____ U.S. ___, *cert. denied* 114 S.Ct. 85, 126 L.Ed.2d 53 (1993), which followed the *Renton* holding. Finally, the Ninth Circuit ruling conflicts with decisions in the Fourth and Eleventh Circuits, both of which have refused to consider the economic viability of sex businesses that locate in certain areas. *D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991); *International Food & Beverage Systems v. Fort Lauderdale*, 794 F.2d 1520

(11th Cir. 1986), *on remand* 664 F.Supp. 482, *aff'd* 838 F.2d 1220 (11th Cir. 1988). These cases both allowed land to be considered that would not be suitable under the *Topanga Press* analysis.

The Supreme Court should grant certiorari and reverse because this ruling conflicts with the Court's decision in *Renton* (and indeed resurrects the Ninth Circuit's flawed reasoning from that case), it conflicts with rulings from the Fourth and Eleventh Circuits, and it conflicts with a ruling of California's highest court on this issue.

ARGUMENT

I. Under *Renton*, Economic Considerations Are Irrelevant And Should Not Be Considered When Determining The Availability Of Land For Sexually Oriented Businesses Under A Particular Zoning Ordinance.

This Court in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), stated that a zoning ordinance regulating the time, place and manner of the operation of adult businesses is constitutional if it "is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *Renton*, 475 U.S. at 47. The question presented here is whether alleged economic feasibility of a particular location is a permissible factor in determining whether that land is available as an alternative avenue of communication. This Court already answered this question in *Renton* by explicitly excluding consideration of the economic viability of sex businesses

in a particular location. *Renton*, 475 U.S. at 54.

The factual backdrop of the *Renton* case is significant because it reveals the direct contradiction between *Renton*'s holding and that of the Ninth Circuit in *Topanga Press*. The *Renton* zoning ordinance left available 520 acres of land consisting of "'ample, accessible real estate'" , including 'acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads.'" *Renton*, 475 U.S. at 53. Included in the 520 acres accepted by this Court as being "ample, accessible real estate" were "(1) a sewage disposal site and treatment plant; (2) a horse racing track and environs; (3) a business park containing buildings suitable only for industrial use; (4) a warehouse and manufacturing facilities; (5) a Mobil Oil tank farm; and, (6) a fully-developed shopping center."

Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 534 (9th Cir. 1984). The Ninth Circuit in *Renton* had ruled that, since there were no commercially viable locations within the 520 acres, the land was not truly available to the sex businesses. *Playtime Theaters*, 748 F.2d at 534. This Court specifically rejected the argument that a lack of commercially viable sites within the 520 acres constituted a sufficient basis to invalidate the ordinance. *Renton*, 475 U.S. at 54.

The court in *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993) established a two-tiered analysis for the determination of whether land is available to sexually oriented businesses. In doing so, the court relied on the incorrect assertion that the *Renton* Court's statements regarding the impermissibility of considering economic factors assumed that the relocation sites were already in the "relevant" real estate market.

At tier one of the *Topanga Press* analysis, economic impact may be considered when determining whether a specific relocation site is part of the relevant market. Once it is established that the site is in the proper real estate market, economic impact may not be considered. *Topanga Press*, 989 F.2d at 1530. Factors which bear on whether a site is in the proper real estate market are whether it is unreasonable to believe that it would ever become available to any commercial enterprise; whether it is reasonably accessible to the public; whether areas in manufacturing zones have proper infra-structure such as sidewalks, roads and lighting; whether a site suits some generic commercial enterprise (warehouses, swamps or sewage treatment plants being unsuitable); and whether the site is commercially zoned. *Topanga Press*, 989 F.2d at 1531.

The *Topanga Press* holding fails to recognize the

context in which the *Renton* Court spoke. The type of land considered to be "ample, accessible real estate" by the Supreme Court in *Renton* (a sewage disposal site and treatment plant, a horse racing track and environs, a business park containing buildings suitable only for industrial use, a warehouse and manufacturing facilities, a Mobil Oil tank farm) would be unsuitable under the first tier of the Ninth Circuit's analysis because it is not in what it considered to be the "relevant" real estate market. Yet, contrary to the assertions of the Ninth Circuit, under *Renton* it was sufficient that the land was a part of the real estate market in general:

> Respondents argue, however, that some of the land in question is already occupied by existing businesses, that "practically none" of the undeveloped land is currently for sale or lease, and that in general there are no "commercially viable" adult theater sites within the 520 acres left open by the Renton ordinance. (citation omitted) The Court of Appeals accepted these arguments . . . .

> We disagree with both the reasoning and the conclusion of the Court of Appeals. That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to, lawful speech," (citation omitted), we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices.

Renton, 475 U.S. at 54 (emphasis added).

Since the land was in the real estate market in general, this Court considered it available to sexually oriented businesses. By disallowing consideration of economic factors, the Court specifically rejected the type of in-depth analysis espoused by the Ninth Circuit in *Renton* and now also in *Topanga Press*. *Renton* reveals the Court's unwillingness to second-guess the decisions

of local governments in this manner because such second-guessing will result in sex businesses receiving preferential treatment in the real estate market. That is a result not required by the First Amendment.

The *Topanga Press* decision represents a resurrection of pre-*Renton* thinking from the Ninth Circuit under the guise of a post-*Renton* clarification. As such, the decision contradicts existing precedent of the Supreme Court. The Court should therefore grant certiorari and once again reverse the Ninth Circuit.

II. The Ninth Circuit Decision Conflicts With Decisions Of The Fourth And Eleventh Circuits, Which Disallow Consideration Of Economic Factors On The Basis Of *Renton*.

The Fourth Circuit in *D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991), upheld the constitutionality of a zoning ordinance restricting sexually oriented businesses to only "a few poorly lit sites in industrial areas far from tourist-

oriented businesses." *D.G. Restaurant Corp.*, 953 F.2d at 147. The court refused to consider the commercial viability of the sites, stating that the restaurant's ability to convey its message was not impeded by the ordinance. Under the Ninth Circuit's analysis, this ordinance would probably have been unconstitutional because it restricted sex businesses to an industrial zone that was not reasonably accessible to the general public and that lacked the proper infrastructure. As such, the land would not be in the "relevant real estate market" and would therefore be unavailable. *Topanga Press*, 989 F.2d at 1530-31.

Similarly, the Eleventh Circuit in *International Food & Beverage Systems v. Fort Lauderdale*, 794 F.2d 1520 (11th Cir. 1986), *on remand* 664 F.Supp. 482, *aff'd* 838 F.2d 1220 (11th Cir. 1988), vacated a pre-*Renton* district court decision which stated that land in a

municipal water works, in isolated areas and in prohibitively high rent areas was unavailable for sex business purposes. In reaching its decision, the district court relied on the Ninth Circuit's reasoning in *Renton*. The Eleventh Circuit remanded the case for reconsideration in light of the Supreme Court's holding in *Renton*. *International Food*, 794 F.2d at 1528. The Ninth Circuit in *Topanga Press* would have agreed with the district court's opinion rather than with the Eleventh Circuit's, particularly with regard to the land in a municipal water works and in isolated areas. By remanding the case, the Eleventh Circuit explicitly recognized that the *Renton* Court intended to disallow consideration of economic factors at any level in the analysis, regardless of the basis for the assertion that available land was unsuitable.

Other circuits have used analyses that conflict

with *Topanga Press*, although it is unclear whether the Ninth Circuit would have reached a different result under the facts of those cases: *Lakeland Lounge v. City of Jackson*, 973 F.2d 1255 (5th Cir. 1992), *reh'g. denied*, 979 F.2d 211, *cert. denied*, 113 S.Ct. 1845 (1993); *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988), *reh'g. denied*, 841 F.2d 107, *cert. denied*, 489 U.S. 1052 (1989); *Alexander v. City of Minneapolis*, 928 F.2d 278 (8th Cir. 1991).

The Fourth and Eleventh Circuits have held that *Renton* disallows consideration of economic factors in cases with facts that show the Ninth Circuit would have ruled differently. The Fifth and the Eighth Circuits disagree with the Ninth Circuit's statement of the law. This Court should grant certiorari to resolve this obvious conflict between the circuit courts.

III. *Topanga Press* Contradicts The Holding Of *National City*, The California Supreme Court Decision Which Followed *Renton*.

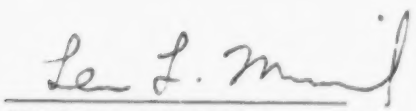
Following *Renton*, the California Supreme Court in *City of National City v. Wiener*, 3 Cal.4th 832 (1992), *cert. denied*, ___ U.S. ___, 114 S.Ct. 85, 126 L.Ed.2d 53 (1993), explicitly disallowed consideration of economic factors when determining whether land was available to sex businesses. The *National City* court took note of the fact that much of the available land in *Renton* was occupied by a sewage treatment plant; a horse racing track; industrial, warehouse and manufacturing facilities; and a Mobil Oil tank farm. *National City*, 3 Cal.4th at 842 (quoting *Renton*, 748 F.2d 527, 534 (9th Cir. 1984)). It was in this context that the *National City* court rejected an economic viability standard for determining whether an ordinance was constitutional. The court did not recognize any distinction between land inside and

land outside the relevant real estate market. Contrary to the Ninth Circuit, the California Supreme Court correctly interpreted the *Renton* holding in light of the underlying facts of the case, not in spite of them. By establishing a two-tiered analysis in which economic factors determine whether a site is in the relevant real estate market, *Topanga Press* directly contradicts the California Supreme Court's reasoning in *National City*. This Court should grant certiorari in order to resolve this conflict between the Ninth Circuit and the California Supreme Court regarding the interpretation of *Renton*.

CONCLUSION

The Ninth Circuit's decision in *Topanga Press* contradicts the U.S. Supreme Court's decision in *Renton*, and conflicts with decisions from two other federal circuits and the California Supreme Court. For these reasons, this Court should grant the petition for writ of certiorari and reverse the ruling of the Ninth Circuit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that 3 copies of the foregoing Brief of Amici Curiae were sent this 21 day of March, 1994, by first class mail, postage prepaid, to cbunsel for Petitioner and Respondent at the following addresses:

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All parties required to be served have been served.

Len L Munsil

LEN L. MUNSIL
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APPENDIX A

CONSENT FORM

I HEREBY CONSENT to the filing of an amicus curiae brief by National Family Legal Foundation in support of the petition for writ of certiorari in the U.S. Supreme Court filed by the City of Los Angeles in Topanga Press v. City of Los Angeles.

DATE: 1/10/94

Attorney of Record for Respondents

BEST AVAILABLE COPY

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March 18, 1994

VIA FACSIMILE AND U.S. MAIL

Len Munsil, Esq.
National Family Legal Foundation
5353 North 16th Street, Suite 400
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Re: City of Los Angeles v. Topanga Press, et al.,
Docket No. 93-1013

Dear Mr. Munsil:

By this letter, Petitioner City of Los Angeles consents to the filing of an amicus brief by the National Family Legal Foundation in support of the Petition for Certiorari in the above case.

Very truly yours,

JAMES K. HAHN, City Attorney

By L. Wayne Mooney
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